(18,258.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 159.

THE FOURTH NATIONAL BANK OF ST. LOUIS, FIRST NATIONAL BANK OF NEW YORK, AND FORD HARVEY, APPELLANTS,

vs.

MORTON ALBAUGH, RECEIVER OF THE FIRST NATIONAL BANK OF EMPORIA; F. C. NEWMAN, ADMINISTRATOR OF THE ESTATE OF C. S. CROSS, DECEASED, AND WILLIAM MARTINDALE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1900, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the third day of December, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the fifth day of July, A. D. 1900, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Fourth National Bank of St. Louis, *et al.*, were appellants, and Morton Albaugh, receiver of the First National Bank of Emporia, *et al.*, were appellees, which said transcript of record is in the words and figures following, to wit:

The United States of America to Morton Albaugh, receiver of the First National Bank of Emporia; F. C. Newman, administrator of the estate of C. S. Cross, deceased, and William Martindale, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to appeal, filed in the clerk's office of the circuit court of the United States for the first division of the judicial district of Kansas, wherein The Fourth National Bank of St. Louis, The First National Bank of New York and Ford Harvey are appellants and you are respondents, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Amos M. Thayer, judge of the circuit court of the United States for the (district of Kansas), this 14th day of May, in the year of our Lord one thousand nine hundred.

AMOS M. THAYER,
2 *United States Circuit Judge for the Eighth Circuit.*

Service of within citation is acknowledged this 21st day of May, 1900.

LAMBERT & HUGGINS,
Attorney- for Morton Albaugh, Receiver of First National Bank of Emporia.
J. JAY BUCK,
MADDEN BROS.,
Attorney- for F. C. Newman, Adm'r of Estate of C. S. Cross, Dec'd.
L. B. KELLOGG,
CHAS. B. GRAVES,
Attorney- for William Martindale.

No. 7681. United States circuit court, — division of the judicial district of Kansas. Fourth National Bank of St. Louis *vs.* Morton Albaugh, receiver, etc., *et al.* Citation. Filed May 14, 1900. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants. } Bill of Complaint.

To the Honorable Henry Caldwell, judge of the United States circuit court, sitting in and for the district of Kansas:

The Fourth National Bank of St. Louis, Missouri, respectfully represents to your honor and complains: That it is a corporation duly created and existing under and by virtue of the national banking acts and that it is now and for more than ten years last past has been doing business as a national bank in the city of St. Louis, Missouri. That the defendant Morton Albaugh, is the receiver of the First National Bank of Emporia, duly appointed, qualified and acting as such and as such receiver succeeds in such office C. S. Jobes, who was at one time such receiver The said First National Bank of Emporia having been up to November 16th, 1898, a national bank duly created and existing under the national banking acts and up to said date doing business as a national bank in the city of Emporia, in the State of Kansas.

That on said date the Comptroller of the Currency of the United States, acting under the authority conferred upon him by the acts

of Congress, took possession of the business and the assets of said bank, and is now in possession thereof by and through the said receiver Morton Albaugh.

That said F. C. Newman is the duly appointed and acting administrator of the estate of C. S. Cross, deceased, and is a resident of the city of Emporia, in the State of Kansas. That the defendant, The First National Bank of New York, is a corporation created and existing under the national banking acts and is doing business as a national bank in the city of New York, in the State of New York, and has been so doing business for more than ten years last past. That Ford Harvey is a citizen and a resident of Leavenworth, in the State of Kansas. That H. C. Whitley and William Martindale are citizens and residents of Emporia, in the State of Kansas.

That at the time that the business and the assets of the said First National Bank of Emporia were taken possession of by the
3 Comptroller of the Currency as herein aforesaid, C. S. Cross was and for a long time prior thereto had been the president of the said bank. That he has since deceased. That at the time of his death he was the sole owner without any incumbrances thereon except as hereinafter mentioned, of a large amount of personal property at Sunny Slope farm, near Emporia, Lyon county, Kansas, such property consisting of live stock, cattle, hogs and horses and various other articles of personal property on said farm and on farms adjoining the same, and he had been such sole owner for a long time prior thereto, to wit: prior to and on July 15th, 1898.

That on and before said 15th of July, 1898, this plaintiff held two notes, each for ten thousand dollars, one of which notes was made by S. Nation, dated November 16th, 1897, and due September 19, 1898, and payable to the order of Martindale and Cross, and was by said payees, Martindale and Cross, endorsed as follows: "Pay to the order of Fourth National Bank, St. Louis, Missouri, Martindale & Cross, C. S. Cross, W. Martindale." Which said note was renewed on September 19th, 1898, by the giving of another of exact character and amount due October 12th, 1898, bearing same endorsements, and on October 12th, 1898, this last note was again renewed by the giving of another note of exact character and amount due November 14th, 1898, and bearing same endorsements; this last note was again renewed by the giving of another note of exact character and amount except that the interest thereon was reduced to 6 % per annum, due December 19th, 1898, bearing the same endorsements a copy of which said last note with all endorsements thereon is hereto attached marked "A" and made a part of this petition. The other of said notes was made directly to this plaintiff as payee by said Martindale and Cross and W. Martindale and C. S. Cross, and was due October 12th, 1898, on which date it was taken up and replaced by a note made by C. V. Eskridge, dated October 12th, 1898, and due November 14th, 1898, and payable to the order of Martindale and Cross and was by said payees, Martindale and Cross, endorsed as follows: "Pay to the order of Fourth National Bank of St. Louis, Mo. Martindale & Cross, C. S. Cross, W. Martindale." Which said note was renewed on November 14th, 1898, by the giv-

ing of another by said C. V. Eskridge of exact character and amount, except that the interest thereon was reduced to 6 % per annum, due December 19th, 1898, bearing same endorsements a copy of which with all endorsements thereon is hereto attached marked "B" and made a part of this petition.

That neither of said notes or any part thereof has ever been paid, but there is due to this plaintiff thereon, and thereof, the
4 sum of twenty thousand dollars with interest thereon at six per cent. per annum from December 19, 1898. Said rate of interest being the rate specified in said notes. That said Martindale and Cross were the defendant- William Martindale and C. S. Cross, deceased.

That there had been at and prior to the 15th of July, 1898, an agreement and understanding between said William Martindale and C. S. Cross, that as between themselves the said notes should be paid by said Cross, the debt as between them being his. And said Cross for the purpose of securing said Martindale in the performance of said agreement, on his part, did on said July 15th, 1898, make, execute and deliver to him the said Martindale, a transfer and bill of sale of all the personal property hereinbefore mentioned, a copy of which is hereto attached, marked "C" and made a part of this petition. That on November 15th, 1898, to still farther evidence said agreement and to still farther secure said Martindale, the said Cross made, executed and delivered to the said Martindale another bill of sale of said property as such security, a copy of which is hereto attached, marked "D" and made a part of this petition.

That after the appointment of C. S. Jobes as receiver of said First National Bank of Emporia, he, the said Jobes, as such receiver, wrongfully and without right or warrant of law, took possession of all of said personal property mentioned in, and conveyed by, said bills of sale, to said Martindale as security as aforesaid.

And that thereupon said Jobes as receiver and said Newman as administrator, Martindale and other parties interested therein for the purpose of saving the costs of an expensive litigation over the said property, and the expense attendant upon the keeping of said property, and to promote the advantageous sale thereof, entered into an agreement whereby all of said property should be sold and the proceeds thereof held subject to the final judgment of a competent court, a copy of which agreement is hereto attached marked "E" and made a part of this petition.

That under said agreement all of said property has been sold and the proceeds thereof, to wit, the sum of fifty-five thousand dollars are now deposited and held as in the said agreement provided.

That this plaintiff and all the other parties who hold paper upon which said Martindale and Cross are mutually bound, and which under the agreement between said Cross and Martindale should be paid by said Cross, are entitled to be subrogated to the rights of said Martindale and to have their claims paid out of said funds.

5 That said defendants The First National Bank of New York, Ford Harvey and H. C. Whitley, are creditors of said C. S. Cross and fall under the terms of the said agreement between

said Cross and Martindale, and are entitled to share and participate in said fund; the exact nature and extent of their respective claims is however, unknown to this plaintiff. That besides the property so conveyed by said Cross to Martindale under said bills of sale, said Cross left no estate.

That said Jobes had no right whatever, neither has said Albaugh any; right to said property or the proceeds thereof. That said Newman as administrator has a right to only so much of said funds as shall remain after the claims of the various parties hereto have been fully paid and satisfied.

The premises considered, this complainant therefore prays and asks the aid of this court in the premises and to that end makes said defendants parties to this bill and prays the usual process of this court to be directed to the marshal of this court commanding him to summon each and all of said defendants to be and appear before this honorable court on the first day of the next term thereof, and then and there make full true and perfect answer to this complainant's bill; and upon the hearing thereof account may be taken of what is due this complainant and each and all others who are entitled to share in the fund as above set out, and that distribution of said fund shall be made in accordance with the equities found existing. And complainant further prays that judgment be rendered in its favor in this action against the defendant William Martindale for the sum of twenty thousand dollars and interest thereon at the rate of six per cent. per annum from the 19th day of December, 1898.

And thus this complainant will ever pray.

CUNNINGHAM & HAMER,
Attorney for Complainant.

We hereby waive the issuance and service of process upon us in the above action and enter our appearance therein.

LAMBERT & HUGGINS,
Att'ys for Morton Albaugh, Receiver of First Nat. Bank of Emporia, Kans.
L. B. KELLOGG,
CHAS. B. GRAVES,
Att'ys for Wm. Martindale.
F. C. NEWMAN,
Administrator of Estate of C. S. Cross.
H. C. WHITLEY.
FIRST NATIONAL BANK OF NEW YORK,
By E. W. CUNNINGHAM, *Its Att'y.*

6 "A."

$10,000. EMPORIA, KANSAS, *Nov.* 14, 1898.

Dec. 15, 1898, — days after date, I promise to pay to the order of Martindale & Cross ten thousand dollars, at Fourth National Bank

of St. Louis, Mo. with interest at the rate of 6 per cent. per annum from date until paid. Value received.
($2.00 rev. stamps.)

S. NATION.

Indorsements: Pay to the order of Fourth National Bank of St. Louis, Mo. Martindale & Cross. C. S. Cross. W. Martindale.
Demand protest & notice of protest waived. Martindale & Cross. C. S. Cross. W. Martindale.

"B."

$10,000. EMPORIA, KANSAS, *Nov.* 14, 1898.

Dec. 15th, 1898 — days after date, I promise to pay to the order of Martindale & Cross ten thousand dollars at Fourth national bank, St. Louis, Mo., with interest at the rate of 6 per cent. per annum from due until paid. Value received.
($2.00 rev. stamps.)

C. V. ESKRIDGE.

Indorsements thereon: Pay to the order of Fourth Nat. Bank of St. Louis, Mo. Martindale & Cross. C. S. Cross. W. Martindale.
Demand protest & notice of protest waived. Martindale & Cross. C. S. Cross. W. Martindale.

"C."

For and in consideration of one dollar and other valuable consideration the receipt of which is hereby acknowledged I do hereby sell transfer and assign to W. Martindale as trustee all my personal property of every kind and description and wheresoever located except the contents of my house where I am now living in Emporia Lyon county Kansas and excepting all my policies of life insurance. This sale does not include the notes pledged to my mother for the indebtedness I owe her amounting to $8375.00 and interest which does not include the $4500.00 Davis and Cross note.

The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses now on Sunny Slope farm Lyon county Kansas together with all other personal property thereon or on farms adjoining also all notes stocks bonds and mortgages excepting as before stated those securing my indebtedness to my mother Sue S. Cross.

7 The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon County court, after that he is to pay himself for any paper upon which he and I are mutually makers or endorsers. The balance if any to be paid the First National Bank of Emporia Kansas for all matters I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. CROSS.

"D."

EMPORIA, KANSAS, *Nov.* 15, 1898.

For one dollar and other valuable consideration the receipt of which is hereby acknowledged I hereby sell transfer and assign unto W. Martindale and his assigns all my right title and interest to the following personal property located in Emporia township Lyon county Kansas and upon what is known as Sunny Slope farm and the leased lands thereunto contiguous, all my cattle, horses, and hogs, all feed, implements, hay, grain, etc. and also all other personal property located thereon whether specifically described hereon or not.

Given under my hand and seal the date above written.

C. S. CROSS.

"E."

Whereas, C. S. Jobes receiver of the First National Bank of Emporia, Kansas, has taken possession of and claims the cattle and other personal property at Sunny Slope farm near Emporia to be the property of said bank and as such assets of said bank in his hands as such receiver, and whereas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, claim- said cattle and other personal property on said farm to be the property of said estate and as such assets of said estate, and

Whereas, Ford Harvey H. C. Whitley William Martindale and other parties claim to have certain rights in said cattle and other personal property by virtue of bills of sale thereof made by said C. S. Cross to William Martindale, and

Whereas, all parties in interest are satisfied that it is to the benefit of all to have the public sale of a portion of said cattle at Kansas City, heretofore planned by C. S. Cross, go on and take place on Dec. 7th, 1898 as advertised. It is now stipulated and agreed that said C. S. Jobes receiver as aforesaid, shall make said sale and as soon as possible sell the balance of the said cattle and other personal property upon said farm for as much money as it is possible for him to obtain for the same, and out of the proceeds of said sale deduct all
8 actual and necessary expenses incurred heretofore and which may be necessary in making said sale, and expenses in feeding and caring for said cattle and other personal property until sold. That he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia national bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator; said net proceeds to be treated by all persons interested, the same as though the cattle and other personal property were the subject-matter of litigation, said funds to remain in said bank until a final decision is reached in the courts as to whom the said funds belong to.

It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle and other personal property shall be prejudiced in any manner, but that all of said rights shall attach to and be vested in the said net proceeds derived from the

sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property.

And the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto nor prevent the assertion of their rights to the net proceeds derived from the sale of said cattle and other personal property in any manner in any court that may desire to assert their said rights or could have asserted rights to said cattle and other personal property had they not been sold by said C. S. Jobes.

It is hereby agreed, in order that said cattle and other personal property may bring as much as possible, and in order that there may not be any question raised as to title by purchasers, that said F. C. Newman, as administrator, shall join with the said Jobes and help sell said cattle and other personal property.

C. S. JOBES,
Receiver 1st National Bank, Emporia, Kansas.
WILLIAM C. HOOK,
Att'y for Ford Harvey et al.
F. C. NEWMAN,
Administrator of the Estate of C. S. Cross, Dec.
L. B. KELLOGG AND
CHAS. B. GRAVES,
Att'ys for William Martindale.
E. W. CUNNINGHAM,
Att'y for H. C. Whitley.

Indorsed: No. 7681. Fourth National Bank *vs.* Morton Albaugh, receiver *et al.* Bill of complaint. Filed February 28, 1899. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas.*

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.
No. 7681. In Chancery.

The answer of F. C. Newman, administrator of the estate of C. S. Cross, deceased, one of the defendants, to the bill of complaint of The Fourth National Bank of St. Louis, complainant.

9 This defendant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said

complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says:

That he admits the corporate existence of the Fourth National Bank of St. Louis, the First National Bank of Emporia, Kansas, the First National Bank of New York, the appointment of C. S. Jobes and of his successor Morton Albaugh as receiver of the First National Bank of Emporia, Kansas, the death of C. S. Cross, and the appointment of said F. C. Newman as administrator and the residence of the parties herein as averred in the said bill of complaint.

This answering defendant further admits and alleges, that said C. S. Cross, at the time of his death, was sole owner of the personal property mentioned and described in said bill of complaint.

This answering defendant, on information and belief, alleges and charges that neither of the so-called bills of sale (Exhibits "C" and "D" to said bill of complaint) are or ever were any lien or incumbrance upon the personal property or the fund mentioned in said bill of complaint.

This defendant on information and belief denies that at any time there was "an agreement and understanding between said William Martindale and said C. S. Cross that as between themselves the said notes should be paid by said Cross, the debt as between them being his;" and alleges that if there was any such agreement it was without adequate consideration and void.

This defendant further alleges that neither of said so-called bills of sale were ever recorded. That continuously from the times purporting to be the dates of said so-called bills of sale and long prior thereto and up to the time of his death said C. S. Cross was in the unquestioned, undisputed, actual, open notorious and exclusive possession and control of all said property; and that none of the parties to this suit except this answering defendant and said C. S. Jobes were ever in the possession of any of said property.

This defendant says that he is informed and verily believes and therefore charges the truth to be that neither of said so-called bills of sale were ever legally delivered to said William Martindale, and insists that if they or either of them ever were legally delivered they were by operation of law a general assignment by said C. S. Cross for the benefit of all his creditors. That said Cross had made prior bills of sale and transfers of said property but whether delivered or not this defendant does not know and concerning which he is not informed, but he alleges that if they were legally delivered, then said C. S. Cross had no title in or authority to convey or pledge said property at the times mentioned in said bill of complaint; and that this defendant has and should be allowed to have the right to dispose of said property pursuant to his said office as administrator.

Wherefore, this defendant prays that said bill of complaint

10 be dismissed as to this defendant and that he recover his costs herein, and prays for all other further and appropriate relief.

LAMBERT & HUGGINS,
BUCK AND SPENCER,
MADDEN BROS.,
Solicitors for said Defendant.

UNITED STATES OF AMERICA, }
District and State of Kansas, County of Lyon, } *ss:*

F. C. Newman, being duly sworn, deposes and says that he is the defendant named in the above and foregoing answer; that he has heard read said answer and understands the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief; and as to those matters he believes it to be true.

F. C. NEWMAN.

Subscribed and sworn to before me this 5th day of April A. D. 1899.

[SEAL.] H. W. FISHER,
Notary Public.

Com. ex. Sep. 5, 1899.

Indorsed: April 5th, 1899. We consent to the filing of this answer out of time. Cunningham & Hamer, solicitors for complainant. No. 7681. In chancery. In the circuit court of the United States for the dist. of Kansas. The Fourth National Bank of St. Louis, complainant, *vs.* Morton Albaugh, receiver of the First National Bank of Emporia, *et al.*, defendants. Answer of F. C. Newman, adm'r, etc. Filed Apr. 6, 1899. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.

Amended Bill of Complaint.

To the Honorable Henry Caldwell, judge of the United States circuit court sitting in and for the district of Kansas:

The Fourth National Bank of St. Louis, Missouri respectfully represents to your honor and complains: That it is a corporation duly created and existing under and by virtue of the national banking

acts and that it is now and for more than ten years last past
11 has been doing business as a national bank in the city of St. Louis, Missouri. That the defendant Morton Albaugh is the receiver of the First National Bank of Emporia, duly appointed, qualified and acting as such and as such receiver succeeds in such office C. S. Jobes who was at one time such receiver. The said First National Bank of Emporia having been up to November 16th, 1898 a national bank duly created and existing under the national banking acts and up to said date doing business as a national bank in the city of Emporia in the State of Kansas.

That on said date the Comptroller of the Currency of the United States acting under the authority conferred upon him by the acts of Congress took possession of the business and the assets of said bank and is now in possession thereof by and through the said receiver Morton Albaugh. That said F. C. Newman is the duly appointed and acting administrator of the estate of C. S. Cross deceased and is a resident of the city of Emporia in the State of Kansas. That the defendant, The First National Bank of New York is a corporation created and existing under the national banking acts and is doing business as a national bank in the city of New York in the State of New York and has been so doing business for more than ten years last past. That Ford Harvey is a citizen and resident of Leavenworth in the State of Kansas. That H. C. Whitley and William Martindale are citizens and residents of Emporia in the State of Kansas.

That at the time that the business and assets of the said First National Bank of Emporia *was* taken possession of by the Comptroller of the Currency as herein stated, C. S. Cross was and for a long time prior thereto had been the president of the said bank. That he has since deceased. That at the time of his death he was the sole owner without any incumbrances thereon, except as hereinafter mentioned, of a large amount of personal property at Sunny Slope farm, near Emporia, Lyon county, Kansas, such property consisting of live stock, cattle, hogs, and horses and various other articles of personal property on said farm and on farms adjoining the same, and he had been such sole owner for a long time prior thereto, to wit, prior to and on July 15th, 1898.

That on and before said 15th of July, 1898, this complainant held two notes each for ten thousand dollars, one of which notes was made by S. Nation dated November 16th, 1897, and due September 10th, 1897, and payable to the order of Martindale and Cross and was by said payees, Martindale and Cross, endorsed as follows: "Pay to the order of Fourth national bank, St. Louis, Missouri, Martindale & Cross, C. S. Cross, W. Martindale" which said note was
12 renewed on September 19th, 1898, by the giving of another of exact character and amount due October 12th, 1898, bearing same endorsements, and on October 12th, 1898, this last note was again renewed by the giving of another note of exact character and amount, due November 14th, 1898, and bearing same endorsements; this last note was again renewed by the giving of another note of exact character and amount due December 19th, 1898, bearing the

same endorsements, a copy of which last note with all endorsements thereon is hereto attached marked "A" and made a part of this complaint. The other of said notes was made directly to this complainant as payee by said Martindale and Cross and W. Martindale and C. S. Cross and was due October 12th, 1898, on which date it was taken up and replaced by a note made by C. V. Eskridge dated October 12th, 1898, and due November 14th, 1898, and payable to the order of Martindale and Cross and was by said payees, Martindale and Cross, endorsed as follows: "Pay to the order of Fourth National Bank of St. Louis, Mo. Martindale and Cross, C. S. Cross, W. Martindale" which said note was renewed on November 14th, by the giving of another by said C. V. Eskridge of exact character and amount due December 19th, 1898, bearing same endorsements, a copy of which with all endorsements thereon is hereto attached marked "B" and made a part of this complaint.

That neither of said notes or any part thereof has ever been paid but there is due to this complainant thereon and thereof the sum of twenty thousand dollars with an interest thereon at 6 per cent per annum from December 19th, 1898. Said rate of interest being the rate specified in said notes. That said Martindale and Cross were the defendant William Martindale and C. S. Cross, deceased.

That there had been at, and prior to the 18th day of July, 1898, an agreement and understanding between said William Martindale and C. S. Cross that, as between themselves, the said notes should be paid by said Cross, the debt as between them being his. And said Cross for the purpose of securing said Martindale in the performance of said agreement on his part did on said July 18th, 1898, make, execute and deliver to him, the said Martindale a transfer and bill of sale of all the personal property hereinbefore mentioned, a copy of which is hereto attached marked "C" and made a part of this complaint. That on November 15th, 1898, to still farther evidence said agreement and to still farther secure said Martindale the said Cross made, executed and delivered to the said Martindale another
13 bill of sale of said property as such security a copy of which is hereto attached marked "D" and made a part of this complaint.

That both of said bills of sale were given in good faith by said C. S. Cross to said Martindale and by him so accepted for the purpose and with the design on the part of both that they should be and operate as chattel mortgages to secure the said indebtedness as aforesaid. That said Martindale did not at the time take possession of the chattel property mentioned in said bills of sale or chattel mortgages, but permitted said Cross temporarily to retain possession thereof. That he did immediately upon the death of said Cross, to wit: on November 16th, 1898, at once take all of the same into his possession and had the same in his possession at the time when said C. S. Jobes wrongfully and without any shadow or claim of right whatever and without the knowledge or consent of said Martindale took the same into his possession whereupon the paper Exhibit "E" was executed for the purpose as hereinafter set out.

That after the appointment of C. S. Jobes as receiver of said First National Bank of Emporia, he, the said Jobes, as such receiver wrongfully and without right or warrant of law took possession of all said personal property mentioned in and conveyed by said bills of sale to said Martindale as security as aforesaid.

And thereupon the said Jobes as such receiver and said Newman as such administrator, Martindale and other parties interested therein for the purpose of saving the costs of an expensive litigation over the said property, and the expense attendant upon the keeping of said property and to promote the advantageous sale thereof, entered into an agreement whereby all of said property should be sold and the proceeds thereof held subject to the final judgment of a competent court, a copy of which agreement is hereto attached marked "E" and made a part of this complaint.

That under the said agreement all of said property has been sold and the proceeds thereof, to wit, fifty-five thousand dollars are now deposited and held as in the said agreement provided.

That this complainant and all the other parties who hold paper upon which said Martindale and Cross are mutually bound and which under the agreement between said Cross and Martindale should be paid by said Cross are entitled to be subrogated to the rights of said Martindale and to have their claims paid out of said fund.

14 That said defendants, The First National Bank of New York, Ford Harvey and H. C. Whitley, are creditors of said C. S. Cross and fall under the terms of said agreement between said Cross and Martindale and are entitled to share and participate in said fund; the exact nature and extent of their respective claims is, however, unknown to this complainant. That besides the property so conveyed by said Cross to Martindale under said bills of sale, said Cross left no estate.

That said Jobes had no right whatever, neither has said Albaugh any right to said property or the proceeds thereof. That said Newman as administrator has a right to only so much of said fund as shall remain after the claims of the various parties hereto have been fully paid and satisfied.

The premises considered this complainant therefore prays and asks the aid of this court in the premises and to that end makes said defendants parties to this bill and prays the usual process of this court to be directed to the marshal of this court commanding him to summon each and all of said defendants to be and appear before this honorable court on the first day of the next term thereof, and then and there make full true and perfect answer to this complainant's bill and upon the hearing thereof account may be taken of what is due this complainant and each and all others who are entitled to share in the fund as above set out and that distribution of said fund shall be made in accordance with the equities found existing and complainant farther prays that judgment be rendered in its favor in this action against the defendant William Martindale for the sum of twenty thousand dollars and interest thereon at the rate

of six per cent. per annum from the 19th day of December, 1898 And thus complainant will ever pray.

CUNNINGHAM & HAMER,
Attorneys for Complainant.

"A."

$10,000. EMPORIA, KANSAS, *Nov.* 14, 1898.

Dec. 15, 1898, — days after date, I promise to pay to the order of Martindale and Cross ten thousand dollars, at Fourth National Bank of St. Louis, Mo., with interest at the rate of 6 per cent. per annum from date until paid.

Value received.

S. NATION.

($2.00 rev. stamps.)

Indorsements: Pay to the order of Fourth National Bank of
15 St. Louis, Mo. Martindale & Cross, C. S. Cross, W. Martindale. Demand, protest and notice of protest waived. Martindale & Cross. C. S. Cross. W. Martindale.

"B."

$10,000. EMPORIA, KANSAS, *Nov.* 14, 1898.

Dec. 15th, 1898, — days after date, I promise to pay to the order of Martindale & Cross ten thousand dollars, at Fourth national bank, St. Louis, Mo., with interest at the rate of 6 per cent. per annum from due until paid. Value received.

($2.00 rev. stamps.)

C. V. ESKRIDGE.

Indorsements: Pay to the order of Fourth nat. bank, St. Louis, Mo. Martindale & Cross. C. S. Cross. W. Martindale. Demand, protest and notice of protest waived. Martindale & Cross. C. S. Cross. W. Martindale.

"C."

For and in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do hereby sell, transfer and assign to W. Martindale as trustee all my personal property of every kind and description and wheresoever located, except the contents of my house where I am now living in Emporia, Lyon county, Kansas, and excepting all my policies of life insurance. This sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to $8375 and interest, which does not include this $4500 Davis and Cross note.

The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses now on Sunny Slope farm, Lyon county, Kansas, together with all other personal property thereon or on farms adjoining, also all notes, stocks and bonds and mortgages, excepting as before stated those securing my indebtedness to my mother Sue S. Cross.

The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon county court, after that he is to pay himself for any paper upon which he and I are mutually makers or indorsers. The balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. CROSS.

"D."

EMPORIA, KANSAS, *Nov.* 15, 1898.

For one dollar and other valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, transfer and
16 assign unto W. Martindale and his assigns all my right, title and interest to the following personal property located in Emporia township, Lyon county, Kansas, and upon what is known as Sunny Slope farm, and the leased lands thereunto contiguous, all my cattle, horses and hogs, all feed implements, hay, grain, etc., and all other personal property located thereon, whether specifically described hereon or not.

Given under my hand and seal the date above written.

C. S. CROSS.

"E."

Whereas, C. S. Jobes, receiver of the First National Bank of Emporia, Kansas, has taken possession of and claims the cattle and other personal property at Sunny Slope farm, near Emporia, to be the property of said bank and as such assets of the said bank in his hands as such receiver, and

Whereas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, claims said cattle and other personal property on said farm to be the property of said estate and as such assets of said estate, and

Whereas, Ford Harvey, H. C. Whitley, William Martindale and other parties claim to have certain rights in said cattle and other personal property by virtue of bills of sale thereof made by said C. S. Cross to William Martindale, and

Whereas, all parties in interest are satisfied that it is to the benefit of all to have the public sale of a portion of said cattle at Kansas City, heretofore planned by C. S. Cross, go on and take place on December 7th, 1898, as advertised. It is now stipulated and agreed that C. S. Jobes, receiver as aforesaid, shall make said sale and as soon as possible sell the balance of said cattle and other personal property upon said farm for as much money as it is possible for him to obtain for the same, and out of the proceeds of said sale deduct all actual and necessary expenses incurred heretofore, and which may be necessary in making said sale and expenses in feeding and caring for said cattle and other personal property until sold. That he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia national bank in the

name of C. S. Jobes, receiver, and F. C. Newman, administrator; said net proceeds to be treated by all persons interested as though the cattle and other personal property were the subject-matter of litigation, said funds to remain in said bank until a final decision is reached in the courts as to whom the said funds belong.

It is hereby expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle and other
17 personal property shall be prejudiced in any manner, but that all of said rights shall attach to and be vested in the said net proceeds derived from the sale of said cattle and other personal property as fully and to the same extent as to the said cattle and other personal property.

And the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto nor prevent the assertion of their rights to the proceeds derived from the sale of said cattle and other personal property in any manner in any court that may desire to assert their said rights or could have asserted said rights to said cattle and other personal property had they not been sold by said C. S. Jobes.

It is hereby agreed, in order that said cattle and other personal property may bring as much as possible, and in order that there may not be any question raised as to title by purchasers, that said F. C. Newman, as administrator, shall join with the said Jobes and help sell said cattle and other personal property.

C. S. JOBES,
Receiver 1st National Bank, Emporia, Kansas.
WILLIAM C. HOOK,
Att'y for Ford Harvey et al.
F. C. NEWMAN,
Administrator of the Estate of C. S. Cross, Deceased.
L. B. KELLOGG AND
CHAS. B. GRAVES,
Att'ys for William Martindale.
E. W. CUNNINGHAM,
Att'y for H. C. Whitley.

We hereby acknowledge service of this amended bill of complaint and consent to its filing.
Apr. 10, 1899.

L. B. KELLOGG,
CHAS. B. GRAVES,
Attorneys for Defendant Wm. Martindale.
BUCK & SPENCER,
Attorneys for Defendant F. C. Newman.
LAMBERT & HUGGINS,
Att'ys for Morton Albaugh.

Indorsed: No. 7681. Fourth Nat. Bank of St. Louis *vs.* Morton Albaugh *et al.* Amended bill of complaint. Filed Apr. 14, 1899. Geo. F. Sharitt, clerk. Cunningham & Hamer, solicitors for complainant.

18 UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.

Answer and cross-complaint of the defendant The First National Bank of New York to the amended bill of complaint of the complainant, The Fourth National Bank of St. Louis, Missouri.

This defendant, The First National Bank of New York, answering the complainant's amended bill of complaint and making cross-complaint, says: It admits that each and all of the matters and things therein set out are true. That complainant's conclusions of law are correct and that it is entitled to the relief as therein prayed for.

Further answering this defendant shows to the court that it is a national bank duly created and existing under the national banking acts and doing business in the city of New York as a national bank. That on and before July 15th, 1898, C. S. Cross was indebted to this defendant in the sum of thirty thousand dollars ($30,000), the same being evidenced by a note signed Martindale and Cross, C. S. Cross, W. Martindale and falling due October 3rd, 1898. That on that date another note of like tenor and amount was given in lieu thereof, a copy of which is hereto attached marked "A" and made a part hereof, that the same fell due December 5th, 1898, and still remains due and unpaid. That as between said W. Martindale and C. S. Cross, the said note evidenced the debt of C. S. Cross, and was secured by the bills of sale set out in the bill of complaint filed herein which said bills of sale were intended by said C. S. Cross at the time they were executed and delivered, as set out in said bill of complaint as chattel mortgages to secure to said Martindale the payment of said thirty thousand dollars as well as the notes set out in complainant's bill. That said Martindale received them as chattel mortgages and for the purpose of securing said debts as aforesaid, and the payment of the claim of the said complainant and of this defendant as aforesaid are secured by said chattel mortgages.

That this defendant is entitled to be subrogated to the rights of said Martindale under said chattel mortgages, and to receive
19 of the fund the proceeds of the sale of said chattels, as set out in the complaint its *pro rata* share thereof.

Wherefore this defendant prays that judgment may be rendered in its favor against said William Martindale in the sum of $30,000 with interest due thereon at six per cent. per annum from October 3rd, 1898, and that said fund the proceeds of the sale of said mortgaged chattels shall be distributed *pro rata* among those who shall

be entitled to receive the same under the agreement set out herein and in said bill of complaint.

E. W. CUNNINGHAM,
Attorney for First National Bank of New York.

"A."

$30,000. EMPORIA, KANSAS, *October* 3*rd*, 1898.

Sixty days after date, we promise to pay to the order of First National Bank New York, thirty thousand dollars at First National Bank New York, with interest at the rate of 6 per cent. per annum from date until paid. Value received. Due Dec. 5, 189–.

MARTINDALE & CROSS.
C. S. CROSS.
W. MARTINDALE.

(Rev. stamps, $6.00.)

Indorsed: No. 7681. Fourth Nat. Bank of St. Louis *vs.* Morton Albaugh *et al.* Answer and cross-complaint of First Nat. Bank of New York. Filed Apr. 22, 1899. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, MISSOURI, Plaintiff,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, Kansas; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants. } Answer.

The answer of William Martindale, one of the defendants in the above-entitled cause, to the bill of complaint of The Fourth National Bank of St. Louis, Missouri, complainant therein, and to the answer and cross-petition of F. C. Newman, administrator of the estate of C. S. Cross, deceased, and to the answer and cross-petition of Morton Albaugh, receiver of the First National Bank of Emporia, Kansas, and to the answer and cross-petition of the said First National Bank of New York.

20 This defendant now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint and said several answers and cross-petitions contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering saith:

This defendant admits the facts set out in the bill of complaint to be true substantially as therein stated, otherwise he denies each and every allegation, averment and statement contained in each of

the several pleadings herein, to wit: The bill of complaint, the answer and cross-petition of (*the*) F. C. Newman, administrator, Morton Albaugh, receiver, and the First National Bank of New York.

This defendant further answering saith that no part of the consideration for the notes set out in the bill of complaint was ever received or participated in by him; and that his only connection therewith or obligation thereon was and is as an endorser and surety thereon at the request of C. S. Cross, president of the said First National Bank of Emporia, Kansas; and that said notes were not sold, discounted or used by this defendant nor by any one else for his benefit, but were sold, discounted and used by the said C. S. Cross for the benefit of the said First National Bank of Emporia, or for himself personally.

This defendant further saith that the Union National Bank of Kansas City, Missouri is the holder of a note for to wit: $10,000 signed by C. S. Cross, and also signed as a surety by this defendant, and bearing the same relation to said fund derived from the sale of the Sunny Slope cattle as the notes set out in the bill of complaint and cross-petition of First National Bank of New York, and said Union National Bank is a necessary party to this suit, wherefore this defendant prays that no judgment or decree herein be rendered against him except is his capacity as surety only, and that the property and estate of said C. S. Cross and the said First National Bank of Emporia, Kansas be first applied to the payment of any judgment and decree that may be rendered upon the notes set out in the bill of complaint herein, or upon the notes set out in the answer and cross-petition of the said First National Bank of New York.

And this defendant prays for all other and further relief to which he may be found entitled, and also prays that said Union National Bank of Kansas City, Missouri be made a party defendant herein and brought into court and required to plead herein.

CHAS. B. GRAVES,
L. B. KELLOGG,
Attorneys and Solicitors for the Defendant William Martindale.

21 Indorsed: No. 7681. Fourth National Bank of St. Louis, Mo. *vs.* Wm. Martindale *et al.* Answer. Filed Apr. 28, 1899. Geo. F. Sharitt, clerk. L. B. Kellogg, C. B. Graves, solicitors, for Martindale.

In the Circuit Court of the United States for the First Division of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, *et al.*, Defendants. } Order.

And now upon this 5″ day of June, 1899, upon the application of the defendant Morton Albaugh, receiver of the First National Bank

of Emporia, and agreement of the parties to the above-entitled cause for the appointment of a special examiner to take and hear testimony and perform other duties as hereinafter provided for, and it further appearing to the court that a special examiner should be appointed to take and hear testimony upon the issues in the above-entitled cause, it is therefore ordered by the court that W. N. Smelser, of Emporia, Kansas, be and hereby is appointed special examiner to take testimony in said cause either on behalf of the complainant or defendants with full power to subpœna witnesses and administer oaths.

That the said special examiner is hereby empowered to compel the production by said complainant or defendants or any of them upon proper application of any of the parties to said cause of any documents, records or other written or documentary evidence that might be necessary in the trial, that are competent evidence and are necessary in trying and determining the issues in said cause.

That said testimony shall be taken by the said special examiner in the city of Emporia, Kansas, and in the city of Topeka, Kansas, and that said special examiner proceed at once in taking said testimony.

It is further ordered that said special examiner report to this court and file the testimony taken herein, within fifteen days after the completion of taking testimony herein.

That said special examiner is hereby directed to notify all parties interested, of his said appointment, and when and where he will begin to take said testimony. No authority however, is hereby given said examiner to make or report conclusions of fact.

WILLIAM C. HOOK, *Judge.*

Indorsed: 7681. The Fourth Nat'l Bank of St. Louis *vs.* Morton Albaugh, receiver of the First Nat'l Bank, Emporia, *et al.* Order appointing special examiner. Filed Jun- 5, 1899. Geo. F. Sharitt, clerk.

22 UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. Louis, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants. } No. 7681. In Chancery.

The answer of F. C. Newman, administrator of the estate of C. S. Cross, deceased, one of the defendants, to the amended bill of complaint of The Fourth National Bank of St. Louis, complainant.

This defendant, saving and reserving to himself now, and at all times, hereafter, all and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said amended bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says:

That he admits the corporate existence of the Fourth National Bank of St. Louis, the First National Bank of Emporia, Kansas, the First National Bank of New York, the appointment of C. S. Jobes and of his successor Morton Albaugh as receiver of the First National Bank of Emporia, Kansas, the death of C. S. Cross, and the appointment of said F. C. Newman as administrator, and the residence of the parties herein, as averred in the said amended bill of complaint.

This answering defendant further admits and alleges, that said C. S. Cross, at the time of his death, was sole owner of the personal property mentioned and described in said amended bill of complaint.

This answering defendant, on information and belief, alleges and charges that neither of the so-called bills of sale (Exhibits "C" and "D" to said amended bill of complaint) are or ever were any lien or incumbrance upon the personal property or the fund mentioned in said amended bill of complaint; nor that either of said in-

23 struments were ever intended or accepted for the purpose or with the design on the part of either of the parties thereto, that they should (*or*) operate as chattel mortgages to secure any indebtedness mentioned in said amended bill of complaint.

This defendant, on information and belief, denies that at any time there was "an agreement and understanding between said William Martindale and said C. S. Cross, that as between themselves the said notes should be paid by said Cross, the debt as between them being his;" and alleges that if there was any such agreement it was without adequate consideration and void; and he especially avers that

portions of said indebtedness *was* really the equitable debt of a partnership composed of said William Martindale and said C. S. Cross; and that a further portion of said indebtedness was, as between said Martindale and Cross, the just and equitable debt of said William Martindale. But this answering defendant cannot accurately state the amounts of the said sums so equitably chargeable against said firm and against said Martindale.

This defendant further alleges that neither of said so-called bills of sale or chattel mortgages *were* ever recorded. That continuously from the times purporting to be the dates of said so-called bills of sale, and long prior thereto, and up to the time of his death, said C. S. Cross was in the unquestioned, undisputed, actual, open, notorious and exclusive possession and control of all said property; and that none of the parties to this suit, except this answering defendant and said C. S. Jobes, were ever in the possession of any of said property since the death of said Cross.

This defendant says that he is informed and verily believes, and therefore charges the truth to be, that neither of said so-called bills of sale or chattel mortgages *were* ever legally delivered to said William Martindale, or any title thereto or interest therein ever passed to him; and this defendant insists that if they or either of them were ever legally delivered they were by operation of law a general assignment by said C. S. Cross for the benefit of all of his creditors. That said Cross had made prior bills of sale and transfers of said property of like character, but whether delivered or not this defendant does not know and concerning which he is not informed, but he alleges that if they were legally delivered they were and are prior and superior to the instruments pleaded in said amended bill of complaint, and in that case said C. S. Cross had no title in or authority to convey or pledge said property at the times mentioned
24 in said amended bill of complaint, and said written instruments; and that this defendant has and should be allowed to have the right to dispose of said property pursuant to his office as administrator, and use the proceeds thereof in the payment of the debts of the Cross estate as the proper probate court may direct and adjudge.

Wherefore this defendant prays that said amended bill of complaint be dismissed as to this defendant and that he recover his costs herein and be adjudged the lawful holder of said fund and decreed to retain the same for proper distribution; and he prays for all other further and appropriate relief.

LAMBERT & HUGGINS,
BUCK & SPENCER,
Solicitors for Defendant Newman.

UNITED STATES OF AMERICA,
District and State of Kansas, County of Lyon, } *ss:*

F. C. Newman, being duly sworn, deposes and says that he is the defendant named in the above and foregoing answer; that he has heard read said answer and understands the contents thereof, and

that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

F. C. NEWMAN.

Subscribed and sworn to before me this 3rd day of June, A. D. 1899.

H. W. FISHER,
Notary Public.

My commission expires Sep. 5th, 1899.

Indorsed: No. 7681. In chancery. U. S. circuit court, district of Kansas. Fourth Nat'l Bank, etc., complainant, *vs.* Morton Albaugh, receiver, etc., *et al.*, defendants. Answer of F. C. Newman, adm'r, etc., to amended bill of complaint. Consent is given to file out of time. Cunningham & Hamer, att'ys for complainant. Filed June 5, 1899. Geo. F. Sharitt, clerk. Lambert & Huggins, Buck & Spencer, Madden Bros., solicitors for def'ts.

25 UNITED STATES OF AMERICA, }
District of Kansas. }

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. Louis, Complainant, *vs.* MORTON ALBAUGH, Receiver, etc., *et al.*, Defendants. } No. 7681. In Chancery.

Answer and replication to the answer and cross-complaint of First National Bank of New York, and to the answer of defendant William Martindale.

Comes now F. C. Newman, administrator of the estate of C. S. Cross, deceased, and for his answer and replication to the answers and cross-complaints of defendants First National Bank of New York and William Martindale, says:

This answering defendant denies that the so-called bills of sale were ever intended as chattel mortgages, as claimed in said answers and cross-complaints, and denies that said Cross ever executed the same, and if so executed and intended, he avers that neither of said so-called bills of sale or chattel mortgages, or any copy thereof, were ever filed for record or recorded as required by the laws of the State of Kansas; and he alleges on information and belief that as between said Martindale and said Cross a portion of said indebtedness was in fact equitably the indebtedness of said Martindale, but the specific amount or proportion thereof this defendant has been unable to ascertain and cannot here aver.

This defendant denies the fact and legal conclusion stated and avers that said First National Bank of New York is not entitled to any relief by way of subrogation, and he denies that "no part of the

consideration for the notes set out in the bill of complaint was ever received or participated in by him (William Martindale); and that his only connection therewith or obligation therein, was and is as an endorser and surety thereon at the request of C. S. Cross, president of the said First National Bank of Emporia, Kansas; and that said notes were not sold, discounted or used by this defendant (Martindale), nor by any one else for his benefit, but were sold, discounted and used by the said C. S. Cross, for the benefit of the said First National Bank of Emporia, or for himself personally;" but avers that a portion of said indebtedness was the indebtedness of said Martindale and that he was and is indebted to said First National Bank of Emporia in a sum largely in excess of the value of all the property mentioned in the amended bill of complaint.

This defendant avers that all the allegations of his answer
26 to the amended bill of complaint herein are true, and he now makes said pleading a part hereof by way of reference as fully as if here repeated *in extenso*.

LAMBERT & HUGGINS,
BUCK & SPENCER,
MADDEN BROS.,
Solicitors for Defendant Newman.

UNITED STATES OF AMERICA,
District and State of Kansas, County of Lyon, } ss:

F. C. Newman, being duly sworn, deposes and says that he is the defendant named in the foregoing pleading, which he has heard read, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

F. C. NEWMAN.

Subscribed and sworn to before me this 13th day of June A. D. 1899.

[SEAL.]

H. W. FISHER,
Notary Public.

My commission expires Sept. 5th, 1899.

Indorsed: No. 7681. In the circuit court of the U. S. for the district of Kansas. Fourth National Bank of St. Louis, plaintiff, *vs.* Morton Albaugh, etc., *et al.*, defendants. Answer and replication to the answer and cross-complaint of First Nat'l Bank of N. Y. and to the answer of defendant William Martindale. Filed Jun- 15, 1899. Geo. F. Sharitt, clerk. Lambert & Huggins, Buck & Spencer, Madden Bros., attorneys for def't Newman. Permission given to file this pleading out of time. June 13, 1899. E. W. Cunningham.

UNITED STATES OF AMERICA,
District of Kansas.

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, Kansas; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants. } No. 7681.

The supplemental answer and amendment to former answer of defendant F. C. Newman, administrator of the estate of C. S. Cross, deceased, to the amended bill of complaint of the Fourth National Bank of St. Louis.

This defendant comes now and asks leave of the court to file this his supplemental answer and to serve as an amendment to
27 his answer, and for reason for this request shows to the court that all the facts here pleaded and not set out in his former answers have come to his knowledge since the filing of his former answer and could not have been discovered by reasonable care and diligence, and for such supplemental answer now here avers and shows to the court:

That said C. S. Cross, at the dates set out in said pretended writings in the amended bill of complaint, and for a long time prior to the failing of said bank on November 16th, 1898, was president of the First National Bank of Emporia, Kansas, a bank duly organized and incorporated under the laws of the United States about January, 1872, and doing business in the city of Emporia, Lyon county, Kansas, at said times and dates that he was a member of the board of directors of said bank, and a member of the discount board of said bank whose duty it was, as such board, to examine, know of, audit and allow accounts against said bank and know of the financial condition and standing of said bank and its relations to and with its creditors and debtors.

That said William Martindale was, at such times and dates, the vice-president of said bank, that he was a member of the board of directors of said bank, and had been such member from the organization of said bank; that he was a member of the discount board of said bank, for all the time such discount board existed.

That said C. S. Cross committed suicide November 16th, 1898; and that, at the dates mentioned in said alleged writings set forth in the amended bill of complaint, and at all times up to the time of his death, the said C. S. Cross owed the said First National Bank, of Emporia, Kansas, the sum of about $300,000.00, which the said William Martindale at all times well knew. That said William Martindale was also owing said First National Bank of Emporia, a large sum of money, to wit: over $100,000.00 and was then insolv-

ent as he then well knew. That the property included in said pretended written instruments set out in said amended bill of complaint was all the property owned by said C. S. Cross; which fact was well known to said Martindale. That said pretended instruments were never delivered by said Cross to said Martindale, but the same were at all times after their execution and up to the time of the death of C. S. Cross in the possession of said C. S. Cross, by a secret agreement, arrangement, conspiracy, and confederation between said Martindale and Cross, with the intent and for the purpose of defrauding said bank and its depositors and creditors and the creditors of said Cross, and with the further intent and
28 purpose to avoid the provisions of the bankrupt law, in pursuance of said agreement, arrangement, conspiracy and confederation, and to prevent the said bank and the creditors of said bank and of said Cross from having said Cross adjudged a bankrupt, and his property applied *pro rata* among said creditors. That while said Cross had many creditors it was thus sought to benefit and pay in full the said complainant and defendant First National Bank of New York, and thus absorb the entire Cross estate.

That during all the times herein mentioned, the said Cross and said Martindale had the exclusive management of said bank. That there was no one else to represent said bank or its creditors while they were spiriting away its assets and feloniously attempting to dispose of the assets of said Cross as aforesaid.

It would be inequitable and unconscionable for said Martindale under all the circumstances of this case, to be permitted to profit by the aforesaid fraud and thus turn over to said complainant and said defendant First National Bank of New York the entire assets of the said Cross estate so as to pay them in full and leave the other creditors without remedy.

That the evidence of pretended sales and mortgages of the Cross estate set out in said amended bill were never delivered in his lifetime; hence this defendant as administrator of his estate is entitled to the possession of said Sunny Slope property and the proceeds thereof held in place thereof, as shown in the pleadings herein.

Wherefore, this answering defendant prays that said amended bill be dismissed, and he prays for all other, further and appropriate relief in the premises.

LAMBERT & HUGGINS,
BUCK & SPENCER,
MADDEN BROS.,
Attorneys for Defendant Newman.

UNITED STATES OF AMERICA, }
State and District of Kansas, County of Lyon, } ss:

F. C. Newman, being first duly sworn, says that he is the answering defendant herein and has heard read the foregoing supplemental answer, and that the same is true in substance and in fact as he is informed and verily believes.

F. C. NEWMAN.

Subscribed and sworn to before me this 29 day of Aug. A. D. 1899.
[SEAL.] H. W. FISHER,
Notary Public.

My commission expires Sept. 5", 1899.

29 Indorsed: No. 7681. In equity. In the circuit court of the United States for the district of Kansas. Fourth National Bank of St. Louis, piaintiff, *vs.* Morton Albaugh *et al.*, defendant-. Supplemental answer of F. C. Newman. Consent is given to file this answer out of time. Cunningham & Hamer. Filed Sep. 5, 1899. Geo. F. Sharitt, clerk. Lambert & Huggins, Buck & Spencer, Madden Bros.

DISTRICT OF KANSAS, } ss:
State of Kansas, County of Lyon, }

Be it remembered, that on the 23rd day of June, A. D. 1899, before me, W. N. Smelser, special examiner duly appointed to take the evidence in a certain case, then and now pending in the circuit court of the United States for the district of Kansas (No. 7681 in equity), wherein The Fourth National Bank of St. Louis is complainant, and Morton Albaugh, receiver of the First National Bank of Emporia, Kansas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, are defendants.

The said complainant and the First National Bank of New York, appeared by Cunningham and Hamer, their attorneys, the said Morton Albaugh by Lambert and Huggins, his attorneys, the said F. C. Newman, by Buck & Spencer and Madden Bros., his attorneys, and the said William Martindale by Chas. B. Graves and L. B. Kellogg, his attorneys, and requested that the testimony be taken, and thereupon each of the witnesses hereinafter named, being of lawful age and sound mind, being by me first carefully examined, cautioned and duly sworn, on their respective corporal oaths, to testify the truth, the whole truth and nothing but the truth, touching the matters in controversy in said cause, respectively depose and say as follows:

S. NATION is produced as a witness for the 4th National Bank of St. Louis, Mo., and the First National Bank of New York, and being first duly sworn, deposes and says:

1 Q. State your name, age, residence and occupation?
A. S. Nation, age 62, Emporia, Kansas, stock business.
2 Q. State if you knew H. C. Cross, in his lifetime, and if he is dead, state when about he died?
A. Yes, sir, about September, 1894.

(The defendant, F. C. Newman, as administrator of the estate of C. S. Cross, deceased, objects to any evidence on the part and on behalf of the complainant herein for the reason that the amended bill of complaint does not state facts sufficient to constitute a cause of

action, or claim for relief against the estate of said C. S. Cross, deceased, nor against any of the interests here represented by this (*objectioning*) defendant.)

3 Q. State whether or not during the period of from 1880 to 1890 you had any business transactions with H. C. Cross, deceased, that resulted in a loss to a partnership composed of yourself and he?

30 It is now here stipulated and agreed by and between the plaintiff herein and the defendants First National Bank of New York, on the one part, and the defendant F. C. Newman, administrator and of the other part, that all objections to the competency, relevancy or materiality of the evidence taken herein shall be considered as objected to as fully as though each objection had been at the time specifically inserted.

A. I did.

4 Q. State the final net amount of such loss?

A. Well, I cannot give it to you, but it was $42000 and some hundred dollars, this is up to the time when H. C. Cross assumed the $20,000 or the two $10,000 notes.

5 Q. State where these two ten-thousand-dollar notes were being carried if you know?

A. My understanding was that they were discounted in St. Louis and New York.

6 Q. Look at the note which I now hand you, a copy of which is attached to complainant's bill of complaint and marked "A" and state whether or not that note is one of the $10,000 notes of which you have spoken?

A. Well, I suppose so, but it would bother me to swear to it positively. I know that one of these notes was being carried by the 4th National Bank of St. Louis.

7 Q. Were there any other of your $10,000 (*dollars*) notes carried at any other bank of St. Louis, besides the 4th national bank, except one of the ten-thousand-dollar notes which you have mentioned?

A. If there was I never knew it.

8 Q. Look at the note which I now hand you and which is the original note a copy of which I ask the commissioner to identify, (*marking*) Exhibit "A" and attached to these depositions, and state whether or not that is one of the ten-thousand-dollar notes concerning which you have testified?

(Objected to as leading, asking for a conclusion of the witness and for a further reason that we object to the copy of the note being incorporated in this testimony because it is not the best evidence.)

A. To the best of my knowledge it is.

9 Q. The cross-complainant The First National Bank, requests the commissioner to identify the note last named "exhibited" to the witness by marking it "Exhibit I" which the commissioner does.

$10,000. EMPORIA, KANSAS, *Oct.* 22, 1898.

Jan'y 1st, 1899 (—) days after date, I promise to pay to the order of Martindale & Cross, ten thousand dollars at First Nat.
31 Bank of New York, with interest at the rate of 6 per cent. per annum, from due until paid. Value received.

S. NATION.

Due ——, 189–.
No. 36643, P. O. ——.
Marked "Ex. I."
(1.00 revenue stamps.) (1.00 revenue stamps.) S. N.

Indorsed on back: 7156. Pay to the order of First Nat. Bank of New York. Martindale & Cross. C. S. Cross, W. Martindale. Demand, protest and notice of protest waived. Martindale & Cross. C. S. Cross, W. Martindale.

(Defendant Newman as administrator, etc., specifically objects to any evidence being introduced on behalf of the First National Bank of New York, because the cross-complaint of said defendant does not state facts sufficient to constitute any cause of action or ground of relief in favor of said bank and against this objecting defendant, and he further objects to any introduction by way of evidence of the note now under consideration, because the same is neither specifically pleaded in or attached to the cross-complaint of said First National bank.)

10 Q. Did you know C. S. Cross in his lifetime, and if so, state what relation he was to H. C. Cross, and if he is dead, state when about he died.

A. I did, he died on the 16th day of November, 1898, he was the son of H. C. Cross.

11 Q. After the death of H. C. Cross who took up and managed the matters of business that existed between you and H. C. Cross prior to his death, if any *one* on the part of H. C. Cross?

(Defendant Newman objects to this question on the ground that it involves a legal conclusion, and not a statement of a fact, and is not the best evidence.)

A. C. S. Cross took charge of mine and H. C. Cross's papers when H. C. Cross went to railroading, and always attended to them afterwards.

(The defendant F. C. Newman moves to strike out the answer for the reason that it is not responsive to the question.)

11 Q. I will ask the commissioner to read the former question to the witness and request an answer thereto.

((Objected) above made here renewed.)

A. C. S. Cross took charge of the business when H. C. Cross went to railroading.

(The above motion to strike out answer is here renewed.)

32 13 Q. How long prior to the death of H. C. Cross did he go to railroading; as nearly as you can tell?

A. Some four or five years.

14 Q. Did C. S. Cross continue in charge of that business up to the time of his death?

A. Yes, sir.

15 Q. You may state what, if any connection, William Martindale had with any of the transactions between you and H. C. Cross and C. S. Cross, concerning which you have testified.

To which the defendant F. C. Newman, objects for the additional reason heretofore given, calling for a conclusion, and not a statement of a fact.

A. None to my knowledge.

16 Q. What, if anything, did either H. C. Cross or C. S. Cross say to you relative to allowing Mr. Martindale to know of those transactions or of informing him of the same?

(Objected to for the additional reason that it is hearsay.)

A. I was cautioned by both H. C. and C. S. to be careful that I did not give him any knowledge of the business.

(Defendant moves to strike out the answer for the reason that it is hearsay, and a conclusion and not a statement of the facts and not responsive to the question.)

Cross-examination:

1 Q. You stated Mr. Nation, about signing notes that you termed accommodation notes, you may now state when you first signed a note that was considered by you an accommodation note, you may now state when this note was payable, and to whom it was payable, and when the note was returned to you, how it was endorsed?

(In addition to the objections heretofore noted, the complainant and cross-complainant object to this question for the same calls for a conclusion of the witness, and is not proper cross-examination, and not the best evidence.)

A. I think in about 1889 but I never noticed any endorsement when the notes were returned to me, do not remember to whom they were payable; signed sometimes in blank.

2 Q. Do you not recall the first time you were asked to loan your name to the bank or Mr. Cross or some one? If so state fully the circumstances connected with it.

(This objected to for the reason last above given.)

A. I do not.

33 3 Q. About how many times did you give your notes that were purely accommodation notes to either the bank, Mr. Cross, or Mr. Martindale?

A. Never gave a note to Mr. Martindale, and I could not say how often I signed notes, that I was called on to sign them at various

times, also my boys were called upon to sign notes, kept no record of the business at all.

4 Q. You may now give us your best estimate of the entire (*accounts*) of accommodation paper that you furnished the First national bank, the Cross's and Martindale and Cross?

A. A man in the bank told me there was enough to build the Nicaragua canal.

5 Q. Mr. Nation, please give us your best estimate in dollars?

A. I could not make an estimate at all, the business has been run so many years.

6 Q. You would say that it amounted to hundred- of thousands of dollars?

A. I would think so.

7 Q. You may now give the largest amount of notes that you gave them at any one time?

(Objected to for the reasons above mentioned.)

A. I have no recollection of giving but two in one day, and two blanks, that was in late years is the reason that I gave that, they were for $10,000 each.

8 Q. You may now state the first business transaction you ever had with the firm of Cross and Martindale, or Martindale and Cross; give the transaction in detail?

(The question is objected to for all the reasons given above and for the additional reason that the question assumes a thing not proven, to wit, that there was a firm of Martindale and Cross or Cross and Martindale.)

A. I never had any business transactions with Martindale and Cross as business transactions except making notes at the bank to Martindale and Cross.

9 Q. When did you first commence (*to*) making notes to Cross and Martindale or Martindale and Cross, give the amounts, and if the note was returned to you state the endorser's name that appeared on the note?

(Question is objected to for all the reasons given above.)

A. I do not call to mind but one particular transaction in 1890. I got $20,000.00 through Cross and Martindale, and I think the Midland National Bank of Kansas City, I think that note was made payable to Martindale and Cross or Cross and Martindale, that is the only note that I can call to mind that was payable to Cross and Martindale or Martindale and Cross.

34 10 Q. This was an accommodation note?

A. No, sir. Spot cash.

11 Q. Is this the only business transaction that you ever had with Cross and Martindale or Martindale and Cross, and is this the only paper that yo ever executed to either of the above-named firms except paper that you executed as accommodation paper?

A. I think of late years I have not signed notes to any one else.

12 Q. Please answer the question that was just read to you by the commissioner?

A. To the best of my knowledge and belief it is.

13 Q. The transaction that you had that resulted in the end in a loss of about $40,000 in which you say Mr. H. C. Cross was your partner you may state how this paper was executed, I mean by that who was it made payable to?

(Objected to for all the reasons given above.)

14 Q. And when I say the paper I mean the notes executed to purchase the cattle and the notes executed to cover the loss?

(Objected to same as above.)

A. I could not say whose name the paper was made in that was given for the purchase of the cattle, but at some time later I discovered $10,000 note payable *payable* to Cross and Martindale, and I was surprised at it because I was cautioned to keep the business from Martindale.

15 Q. Do you know Mr. Nation, that the notes that you signed, to borrow the money to buy the cattle that you now term partnership cattle were all made payable to Cross and Martindale or Martindale and Cross; do you not also know that the two ten-thousand-dollar notes that you executed to represent the loss made by this partnership were made payable to either Cross and Martindale or Martindale and Cross. Do you not also know that from time to time when you renewed these notes when you took up the old notes you would find it endorsed Cross and Martindale, or Martindale and Cross, with the signature of William Martindale on the back of the note in his own handwriting?

(The complainant and the cross-complainant The First National Bank of New York object to the question for the reason that it is not proper cross-examination and assumes the existence of many things not shown, is not the best evidence, calls for an opinion of the witness and not facts.)

A. The original purchase-money that bought these cattle I do not recollect how these notes were signed, and I do not recollect
35 how those two ten thousand (—) notes were originally made payable, but later I know they were made payable to Martindale and Cross or Cross and Martindale do not think that I ever saw one of them with Martindale's endorsement on it, that is his personal endorsement.

16 Q. Do you mean to say that you transacted a business wherein you borrowed a large amount of money that resulted in a loss of over $40,000 and that you had executed your note for the purchase-money to invest in the cattle and that you executed your note to represent the loss and cannot now tell who the notes were made payable to, or in other words cannot tell who you borrowed the money from?

(Objected to for the reasons last above given.)

A. At this date I cannot tell who they were made payable to, but some of the money was borrowed from the First national bank, some of Quinlin Montgomery and Co., and some of the cattle bought on time.

17 Q. The money borrowed from the First National Bank Emp. was evidenced I suppose by a promissory note, will you swear that they were not payable on their face to Cross and Martindale or Martindale and Cross?

(The question above is objected to for all the reasons last given.)

A. No, sir, because I do not remember.

18 Q. When as you have stated, you signed your sons' names and they signed your name to notes, were those notes new, separate deals and transactions, or were they all referable to the original partnership business between you and H. C. Cross?

A. Well I think these two notes were varied by S. Nation, Carl Nation and Fred Nation at different times.

19 Q. What I want to know is did this promiscuous signing of notes by yourself and sons pertain only to the original business of H. C. Cross and yourself including the dividing up of the losses and carrying (*for*) the papers thus made, or was it a custom which pertained to other payees of notes, in business wholly foreign to your partnership deal in cattle?

(Question is objected to for all the reasons given above.)

A. I do not know what you might term it, we signed papers whenever they called for them.

20 Q. And this regardless of the fact whether you owed a cent of the indebtedness evidenced by the papers that you were then signing?

A. Yes sir.

21 Q. You have been in consultation with William Martindale during the noon hour, have you not?

A. Yes sir.

36 22 Q. You may state whether he has refreshed your memory about any transactions that (—) may wish to change or qualify in regard to any of your answers heretofore given?

A. Yes. Well I told him that I could not remember about these notes given away back in 1884, he called my attention to the fact that it was customary (—) sign notes in blank and take letters of credit fully nine times out of ten we paid for cattle in the West that way.

Q. You transacted business with the First national bank in that way did you?

A. Very largely.

23 Q. Were any of these notes you signed in blank used when you never authorized them to be discounted, and did you derive any benefit out of the discount?

A. Well I do not know.

24 Q. Did you make these kind of notes to Cross and Martindale or Martindale and Cross?

A. They were usually signed in blank.

25 Q. You knew Mr. Nation from the time you commenced to sign notes in 1884 to purchase cattle that you and Cross were interested in up to the death of H. C. Cross that Cross and Martindale were in business together?

(*A.*) (Objected to for the reasons above given and because it assumes facts not shown and not true.)

A. I knew that they were both connected with the First national bank.

26 Q. You knew that they were together in various other transactions did you not Mr. Nation?

A. Only from hearsay.

27 Q. Well you believed what you heard (*it*) that respect did you not?

(Question is objected to for all the reasons given above, and not proper cross-examination.)

A. Never had any reason to doubt it.

28 Q. You knew that they had been very intimate and had been for years?

(Objected to for the same reasons as above.)

A. Yes sir.

29 Q. You speak of putting all of your notes, given to pay the loss growing out of your partnership with Cross, into two ten-thousand-dollar notes in 1889?

A. Yes.

30 Q. Now prior to that time you had no business dealings with the firm of Cross and Martindale or Martindale and Cross unless Martindale was interested with Cross in the cattle transaction that you have mentioned in which you sustained the $40,000 loss?

37 (Objected — for the reasons as above, and assumes a condition of things not shown to be true.)

A. I never had a transaction with either one of them, when I had reason to think that the other had any interest in the deal.

31 (—.) Please read the question again and ask the witness to answer it directly?

(*A.*) (Question objected to the witness having already answered to the extent of his information.)

A. I do not see how I could answer it otherwise.

32 Q. You know that Cross and Martindale were very closely connected in various business transactions and socially, did you not?

A. I knew they were closely connected socially but in regard to the business transaction only hearsay.

33 Q. From what you understood you knew they were both officers of the First national bank, both interested in a coal company in Missouri, both interested in a railroad or two, both interested in

Colorado and California lands, and several other enterprises were they not?

(A.) (Objected to for the reasons above and not proper cross-examination, hearsay evidence called for.)

A. I do not remember anything about these things.

34 Q. You do not know whether Cross was interested with Martindale in this cattle deal or not, to your own personal knowledge?

A. I do not. Only from the reasons that I have answered there that I was cautioned not to let Mr. Martindale know anything about.

35 Q. You have stated on the examination today in reply to nearly every question that has been put to you, that Cross told you not to let Martindale know anything about?

(Objected to for the reasons above and that the record shows the question was not true.)

A. I do not remember when that was.

36 Q. How many times have you answered that question today when you was not directly asked for it?

A. Whenever the question drew it out of me.

37 Q. When did you hear Cross state that last?

A. I do not remember.

38 Q. About how long ago?

A. It was when this business first commenced.

38 39 Q. Then you say away back in 1884?

A. In 1884 to 1890.

40 Q. I suppose that occurred now and then in the various transactions that you had during that time?

A. Well, possibly so, it was not a frequent occurrence.

41 Q. Who did you first tell about this conversation between you and Cross?

A. I never told any person but my own boys.

42 Q. Will you state upon your oath that until you made the declaration today in this room that you never told any one other than your sons?

A. I do not remember who I first told.

43 Q. How many times have you talked with Mr. Martindale about it?

A. I should think two or three times.

44 Q. Name some particular transaction that you were engaged in when Cross told you not to tell Martindale?

A. I do not remember any particular one.

45 Q. This only applied to the covering up the loss by giving notes, did it not?

A. It applied to the whole business.

46 Q. Was there anything but legitimate business done by you prior to 1889 in the way of executing notes without consideration?

A. Not that I remember of.

47 Q. In 1889 I understood you to say that you had a complete settlement with Cross your partner, and that you executed about

that time two ten-thousand-dollar notes, and these notes represented Cross' part of the loss?

A. No, sir, I did not say that.

48 Q. What did you say about executing two ten-thousand-dollar notes?

A. I said that on October 10, 1889, I filed a statement with H. C. Cross where our liabilities were $20,000, two ten-thousand (—) notes at the First national bank, $1500 to Fish, Keck and Co., $100 to T. N. Sedgwick, and $141 to L. Nation.

49 Q. At that time did you have another note in that bank that you had given to Cross, First national bank, Martindale and Cross, or Cross and Martindale?

A. I might have had of my own private business, but I do not remember.

50 Q. I will ask you to state, Mr. Nation, if you executed on November 5th, 1888, two ten-thousand-dollar notes payable ten months after date, payable at the First National Bank of New York, and payable to Martindale and Cross?

—. ——.

51 Q. To refresh your memory I herewith hand you note.

A. That is my signature.

52 Q. I will ask you if just prior to that time, namely September 18, if you did not execute a note for $10,000 payable to Martindale and Cross and payable at the First National Bank of New York?

39 A. That is my signature, yes I signed the note.

53 Q. Now Mr. Nation take the notes signed S. Nation, you say you signed $20,000 signed on Nov. 5th, 1888, and $10,000 Sept. 18th, 1888, please state what transactions these notes represent?

A. That Pet Nation note which I endorsed represented partial payment on 300 steers that he and H. C. Cross fed in partnership; let me correct that, I guess that answer is right. S. Nation had nothing to do with that Pet Nation transaction. The other two I have no recollection I suppose they were given for cattle, it was about the time of year that I filled up feed-lots.

54 Q. Do you know that these two ten-thousand-dollar notes represent the $20,000 loss that you spoke of in your former testimony?

A. It might be possible, I do not remember that far back.

55 Q. Please explain why it is that you could not remember of ever having done any business with Martindale and Cross, when you now say that you transacted business with them to the amount of $80,000 with them in 60 days?

A. The business was transacted with H. C. Cross.

56 Q. But you know now that the notes were all payable to Martindale and Cross?

A. I know it now.

57 Q. How much other business did you transact with that bank in 1888, Mr. Nation?

A. I do not remember now.

58 Q. I will ask you to remember and refresh your memory (*that*)

you did not owe that bank $53,000, $30,000 of the same being payable to Martindale and Cross?

A. That note and that note represents. No, sir, if you count my liability as endorser, I did owe that amount.

59 Q. Do you think now in 1888 that you had $20,000 of obligations outside of the $53,000 that I called your attention to; do you think you had $20,000 over and above the $53,000?

A. I do not think so.

60 Q. You do think, Mr. Nation, that the $20,000 of notes that you executed to cover the loss to Martindale and Cross is included in the $53,000.

—. ——.

61 Q. You may tell us if this is not a fact. That the ten-thousand-dollar note dated September 18, 1888, for ten thousand dollars payable at New York, and payable to Martindale and Cross, represented one of the ten-thousand-dollar notes that you signed, the consideration being the loss on the cattle that you and Mr. H. C. Cross handled?

A. I would think that it was.

62 Q. You may tell us if the note dated Nov. 5th, 1888, for ten thousand dollars payable to Martindale and Cross, payable at the First National Bank of New York, if it is not the other ten-
40 thousand-dollar note the consideration of which was the loss on cattle sustained by you and Mr. H. C. Cross?

A. I would not think so.

63 Q. Why not?

A. Because it was given in the season of the year when we were buying our cattle and secured by chattel mortgage.

64 Q. When you say that it was secured by chattel mortgage, you mean you see a memorandum on the note, to that effect, do you not?

A. Yes.

65 Q. If it should turn out that this particular note never was secured by a chattel mortgage the memorandum being placed there for some purpose would you not then think this was one of the notes that represent the loss sustained by Cross and Nation?

A. I was always told and believed that those notes were discounted in St. Louis and New York, this being with a like amount due in New York makes me doubt that it was one of the notes given for the loss.

67 Q. Is it not the fact, Mr. Nation, that at first these notes were discounted in New York, but afterwards half of them were discounted in St. Louis?

A. It might have been I have no way of knowing now.

68 Q. Then if I understand you right you are only willing to testify that one note for ten thousand dollars, payable to Cross and Martindale was executed by you, to cover the loss sustained in the cattle transaction you and Mr. H. C. Cross had, as to the other ten-thousand-dollar note as to who it was payable to, you are not quite clear?

—. ——.

69 Q. This is correct, is it not?

A. Yes, sir.

70 Q. You may state if you did not on the 24th day of December, 1888, give a general bill of sale to the First National Bank of Emporia, for $20,000?

A. Yes.

71 Q. Now then, Mr. Nation, was not that bill of sale given to enable Mr. Cross to say that the $20,000 that he held of notes payable to Martindale and Cross that they were secured by chattel security? In accordance with the memorandum that you saw on the notes a few moments ago?

A. I have no recollection of that transaction whatever.

72 Q. You do know however that you signed the bill of sale? under the date of Dec. 24th, 1888?

A. I know it now.

73 Q. The $53,000 worth of notes that you say that you owed to the bank, Martindale and Cross in 1888, how many of those notes were paid at the time you sold your cattle the fall following?

A. I reckon they were all paid.

74 Q. The notes then that were not paid that year but renewed for the same amount would be either the notes representing the loss on the Cross and Nation cattle or you (*are*) giving accommodation notes at that time?

41 A. I do not say so.

75 Q. Calling your attention again to the two ten-thousand-dollar notes dated Sept. and Nov. A. D. 1888, if these notes were renewed, that is to say, new notes given for the exact amount, from time to time, would you not then say those are the two notes that were given to represent the loss of Cross and Nation?

A. No.

76 Q. Why not?

A. Because I might have bought a new lot of cattle and used this money (*and used this money*) in paying for them, and might have continued the old note instead of making new paper.

77 Q. If the bill of sale heretofore referred to does not cover the two notes payable to Cross and Martindale, what two notes do you think it was given to cover?

A. I have no recollection of the transaction.

78 Q. Mr. Nation when did you first learn that you were giving notes to Martindale and Cross when they were being renewed signed Martindale and Cross, and also signed William Martindale?

A. I have no recollection of ever seeing one of them, signed William Martindale.

79 Q. How many notes do you think you executed to Martindale and Cross?

(*A.*) (Objected to as calling for a conclusion of the witness, a question of the witness he having testified that he did not know.)

A. Do not know only from hearsay.

80 Q. Do you rely upon hearsay as to the number of notes that you executed?

A. I have no record, and do not know.

81 Q. When did you commence signing notes and delivering them, when you received no consideration for them?

A. Some time prior to when Mr. Cross went to railroading.

82 Q. Do you know what time he went to railroading?

A. I do not.

83 Q. You may state if you have any way that you may tell, say within a year that you commenced to execute and deliver notes for which you received no consideration?

A. I have no way of tell- positively, my best recollection would be from 1889 to 1890.

84 Q. When you renewed these notes, if you did renew them from time to time, did you take up the old notes?

A. No sir.

85 Q. I will ask you to state now as near as you can about the amount of notes that you have signed all told and turned over to Mr. Cross, or the bank or Martindale, or Martindale and Cross, or anybody connected with the bank, I mean from the day you commenced until the day the bank closed?

42 A. I have not the remotest idea,

86 Q. Would you say that it would amount to $500,000?

A. I would think a good deal more.

87 Q. You may now state, that is give your best judgment as to the amount of notes you executed and delivered to Mr. Cross Mr. Martindale, the First National Bank of Emporia, or anybody connected with it, that were executed without any consideration?

A. I have not the remotest idea.

88 Q. Would you say that it would amount to $500,000?

A. I would not think so not near.

89 Q. Would it amount to half of that?

A. It is owing to what they filled the blank notes for.

90 Q. How many blank notes did you execute?

A. I have no recollection.

91 Q. You gave them notes whenever they wanted them?

A. Yes sir.

92 Q. How late did you continue to give them notes purely for their accommodation?

A. I was in the territory and Carl wrote me that he had signed four notes to the bank.

(Moved to strike it out, as not responsive to the question, and hearsay.)

93 Q. The note that Judge Cunningham showed you this morning one for ten thousand supposed to be held by the First National Bank of New York and one for ten thousand held by the 4th National (—) of St. Louis, both of these notes are payable to Martindale and Cross are they not?

A. Yes.

94 Q. What were they given for?

A. My understanding (—) that they were given for S. Nation

and H. C. Cross' losses. In other words to cover H. C. Cross' part of the losses.

95 Q. At the time the bank failed Mr. Nation you may state how much you owed the bank, and Martindale and Cross, and Cross if anything?

A. I have no knowledge but what my bank book shows, $104 due me.

96 Q. All the notes signed by you that were held by the bank or anybody for the bank or held by anybody for Martindale or Cross or for Cross or for Martindale, were accommodation notes and did not represent a genuine indebtedness of your own?

A. I do not say so.

97 Q. Please state what notes of the kind and description stated in the other question that were genuine at the time the bank failed, by genuine I mean your own obligation?

A. My bank book shows that all of my notes have been paid there may have been some carried over that were not marked paid, or cancelled.

43 98 Q. Were there any of your notes in existence at the time the bank failed except accommodation notes that had not been paid by you at the time the bank failed? Either payable to the bank, Martindale and Cross Cross and Martindale, or Cross or Martindale?

A. I do not know. My bank book shows that I have paid all of my own notes.

99 Q. You may state the first business transaction that you had with Mr. Martindale in which you executed any notes?

A. Was for the payment of 400 cattle bought in Butler county. I gave Mr. Martindale 3 or 4 notes payable to Osage City, and Madison, for the money to pay for those cattle; they are the only notes that I ever executed to Mr. Martindale, I think it was in 1896, I borrowed $11800.

100 Q. Did you pay that did you get your notes?

A. I paid it, I did not get the notes.

101 Q. Did you ever get the money on these notes?

A. They were never credited to my account.

102 Q. Were they charged to you, or did you pay the notes?

A. One of them is charged up to me in my bank book, and $3500 on the other.

Redirect examination:

1 Q. You may state the magnitude of your cattle dealings commencing along when you first began with H. C. Cross and running along say up to the time of his death?

A. Well the business varied, we fed ourselves from 1200 to 2000 each year besides we bought and sold a great many feeders.

2 Q. What would be the value of these per head say on the average?

A. Well the fed cattle would range in price from $40 to $50, feeders from $25 to $40.

3 Q. How would the annual dealings run in a month, during this time?

A. Probably it would vary, but would run from 25 to 40 dollars for feeders and 40 to 50 dollars for fed cattle, and some seasons we would do as much as -200,000 and others not so much. We done -250,000 worth of feeders in 1896.

4 Q. Now as I understand you there were three classes of notes which you signed, one representing the cattle transactions and money obtained therefor, one representing this loss of $20,000, and one of purely (*of*) accommodation notes, which the bank used to discount, is that true?

A. Yes, sir.

5 Q. In the signing of these accommodation notes, were they signed after being filled up or in blank?

A. Sometimes one way and sometimes the other.

44 6 Q. Was that true generally of the paper signed there?

A. Yes.

7 Q. Do you intend to testify that this $20,000 of notes covering the Cross-Nation loss was paid in 1888, or at any other time?

A. No, sir.

8 Q. You may state whether or not the note for ten thousand dollars now owned and held by the First National Bank of New York, and the one for a like amount held by the 4th National Bank of St. Louis, and both signed by you, represent this Cross-Nation loss?

A. I have so understood it all the time.

9 Q. Do you so understand it now?

A. Yes, sir.

S. NATION.

C. V. ESKRIDGE is produced as a witness on behalf of the complainant The 4th National Bank of St. Louis, and the cross-complainant The First National Bank of New York, and being first duly sworn deposes and says:

1 Q. You may state your name, age, place of residence?

A. C. V. Eskridge, 56, Emporia, Kansas.

2 Q. How long have you resided in Emporia?

A. Over 40 years.

Q. 3. Have you ever had any business transactions with the First National of Emporia, Kansas?

A. Yes, sir.

Q. 4. Look at the note which I exhibit to you, dated Emporia, Kansas, Nov. 4th, 1898, due December 15th, 1898 payable to the order of Martindale and Cross for $10,000 at the 4th National Bank of St. Louis, being the original Exhibit "B" attached to the bill of complaint, and state whose signature it is to the note?

A. It is my signature.

Q. 5. I will ask the commissioner to mark this original note Exhibit "2" which he does.

$10000. EMPORIA, KANSAS, *Nov.* 14", 1898.

Dec. 15th, 1898, — days after date I promise to pay to the order of Martindale & Cross ten thousand dollars at Fourth Nat. Bank of St. Louis Mo. with interest at the rate of 6 per cent. per annum from due until paid. Value received.

C. V. ESKRIDGE.

Due —— 189–.
No. 36675. P. O. ——.
Ex. 2. W. N. S.

($2.00 rev. stamps.)

Indorsed on back: Pay to the order of Fourth Nat. Bank St. Louis, Mo. Martindale & Cross, C. S. Cross, W. Martindale. Demand protest & notice of protest waived. Martindale & Cross. C. S. Cross, W. Martindale.

Q. 6. I will ask you to look at the original note dated Emporia, Kansas, October 24th, 1898, due January 1st, 1899, payable to Martindale and Cross for $10,000 at the First National Bank of New York, and state whose signature is appended to that note?

A. Well, that is my signature.

45 7 Q. I will ask the commissioner to mark this Exhibit "3" for identification and will ask the commissioner to attach a copy of this to the deposition, which he does.

$10000. EMPORIA, KANSAS, *Oct.* 24, 1898.

Jan'y 1st, 1899, — days after date we promise to pay to the order of Martindale & Cross ten thousand dollars at First National Bank of New York, with interest at the rate of 6 per cent. per annum from due until paid. Value received.

C. V. ESKRIDGE & CO.

Due —— 189–
No. — P. O. ——
Ex. "3" W. N. S.

(1.00 revenue stamp.) (1.00 revenue stamp.)

62 E. & Co.

Indorsed on back: 7155. Pay to the order of First National Bank of New York. Martindale & Cross. C. S. Cross, W. Martindale. Demand protest & notice of protest waived. Martindale & Cross. C. S. Cross, W. Martindale.

(The defendant Newman on first examination of this note testified about now objects to its introduction or consideration upon the grounds that it is incompetent, irrelevant, and immaterial and neither the instrument itself or any copy thereof are pleaded in this suit by either party now seeking to avail themselves thereof.

8 Q. You may state Governor, whether or not the consideration of either of these notes moved due from William Martindale?

Defendant Newman objects for the reason in addition to the reasons heretofore given, that it calls for a conclusion of the witness and not a statement of facts and is not the best evidence.

A. No, sir.

Cross-examination:

1 Q. Governor, I will ask you, if you got any consideration from any one for either of these notes, that you have (—) presented to you?

A. Not that I know of.

2 Q. I note Governor one of these notes was signed C. V. Eskridge and Co., you may please state, what that is intended to represent? That is to say who was the company?

A. There was not any company, I signed them when Mr. Cross wanted me to sign them.

5 Q. Were you ever in partnership with Mr. Martindale in any transaction?

A. At no time.

4 Q. When did that partnership commence?

46 A. Well, there never was a partnership, when the Republican was started it was started by a company, but that lapsed as I understand it.

5 Q. Is it not a fact that Mr. Cross, Mr. Martindale and yourself were partners in the establishment of the Republican in the buying out of the News, and in the running of newspaper for some time?

A. We all had an interest.

6 Q. Is it not a fact, you had settlements at various times when you figured up the losses the amount of indebtedness and in the transactions Mr. Martindale was one-third interested?

A. We never had a settlement.

7 Q. I will ask you, Governor, if it is not a fact that you, H. C. Cross and Mr. Martindale, did not have a settlement on August 26th, 1890, in which you considered the amount of the indebtedness of yourself and the Emporia Republican Company, and growing out of that settlement if there was not substantially, this state of affairs, Emporia News Company overdraft, $3898.78. Interest on same from November 26th, 1889 to August 26th, $292.35 overdraft of the Emporia Republican Company $3823.76 interest on same $298.68 interest on 10,000 (notes) due August 6th $5.55 interest on 10,000 note, due July 5th, $144.45 interest on 10,000 due July 9th, $133.33 interest due on another 10,000 note due August 6th, $55.55, and other items involved in that settlement interest on $40,000 note for 93 days from August 26th, which was $1033.34 making a total counting this interest on notes and overdrafts of $9735.49. I will ask if it was not settled upon this basis that William Martindale gave his check for $3245.16 that Cross gave his check for the same amount, and that you settled your one-third by the following items including your $3245.16 which was added to a note of $6020.15 interest $48.34 interest on $9313.65 for 93 days making a total of $240.60 and if you did not then on that date give your note in set-

tlement of that transaction for $9554.25. Please state if the transaction *that* the transactions I have just stated did not occur at the date I have mentioned that is the settlement of your matters by Mr. Cross, up to that date?

The complainant and cross-complainant The First National Bank of New York object- to the question the same being irrelevant, incompetent and immaterial and not proper cross-examination, in calling for an opinion of the witness and not being the best evidence.

A. There was no settlement that I remember of.

8 Q. Did not the Emporia Republican get a credit, by check from William Martindale and a check from H. C. Cross for $3245.16?

47 (Objected to for the reasons above given.)

A. I cannot say.

9. Q. You know Mr. Eskridge that clear up to the time the bank failed, Mr. Martindale was a partner in the Emporia Republican and the C. V. Eskridge printing establishment?

A. No, sir, he was not.

10 Q. Did you not state to Mr. Jobes at the time the bank failed or a short time thereafter, that Cross and Martindale were interested with you?

A. No, sir, I did not.

11 Q. You may state Governor, if at the time the Emporia News was purchased Mr. Martindale was a partner in that purchase?

(Question objected to for the reasons above given.)

A. I only knew what Mr. H. C. Cross said, I never had it from Mr. Martindale.

(I move to strike out because it is hearsay.)

12 Q. You were informed by Mr. Cross that Mr. Martindale would take an interest?

(Objected to because irrelevant and hearsay.)

A. Mr. Cross said Mr. Martindale would take an interest or something to that effect.

13 Q. When did you first find out that Mr. Martindale was interested in the newspaper business that you were engaged in?

A. Some years ago, I do not know just how long.

14 Q. How many years would you say?

A. O, I guess 8 or 10, I assumed all of the indebtedness the property was to be mine for assuming whatever interest might be claimed by any other party.

15 Q. Did you execute at various times prior to 1890, notes amounting to $40,000 that represented the indebtedness of yourself or the Emporia Republican Company?

A. I cannot say how many I executed.

16 Q. When did you first give a note that was purely accom-odational and that did not represent any business transactions of your company or the firm you were connected with?

(The questions that *has* been asked this witness, and shall hereafter be asked are objected to by the complainant, and cross-complainant The First National Bank of New York, same are not proper cross-examination.)

A. I could not say, just when I gave a note that was purely accom-odational.

17 Q. At the time the bank failed how many notes, and to what amount did you have in existence that you had given either
48 to the bank, or Martindale and Cross or Cross and Martindale, or Cross?

A. I could not tell.

18 Q. Can you approximate it, come within $25,000 of it?

A. I do not know whether I could. These matters had been running on along for about 18 years and we never had a settlement, I signed any paper Mr. Cross desired signed hardly taking any account of it, I trusted to him to keep this matter all straight, I asked him about it one time and he said everything was all right and nothing wrong and when he wanted any note signed, I signed it, I had full confidence in Mr. Cross, that he would take care of these notes.

19 Q. What were you signing these notes for?

A. Well I considered I was signing them for accom-odation to Mr. Cross.

20 Q. Were you signing them as accom-odation notes, or were you signing them to give them evidence of indebtedness on your part?

A. No not exactly, I supposed that I owed the bank something.

21 Question. Did you know whether you did or not?

A. What the amount was I could not tell.

22 Q. What kind of an arrangement did you have up there, by which you was to get money by the thousands of dollars and give notes and are now unable to tell within $25,000 of what you did get? Please state the arrangement you had, and with whom you had it?

A. We had no arrangement.

23 Q. You noticed that these notes were all the time payable to Martindale and Cross?

A. I did not notice.

24 Q. Do you mean to state that you gave notes going back for 18 years in amounts that you are unable to tell within twenty-five thousand dollars of the amount that was due at the time the bank failed and that you cannot say who those notes were payable to?

A. I did not care who they were payable to.

25 Q. I suppose you occasionally got an old note when you renewed your notes?

A. Sometimes I did and sometimes I did not.

26 Q. Did you notice on the face of the note that it was payable to Martindale and Cross and on the back endorsed Martindale and Cross, C. S. Cross, William Martindale and at times the firm of Martindale and Cross was in the handwriting of Martindale?

A. I may have noticed it at the time, I did not pay any attention to it; the amount was the principal thing.

27 Q. You did not pay much attention to that did you?

A. Not a great deal. I suppose Mr. Cross was keeping the matter straight and some time or other we would have a settlement.

49 28 Q. I will ask you this question, Governor, upon your oath how many times you talked with Mr. Martindale about your condition in the bank the amount that you, the Emporia Republican Company, C. V. Eskridge, C. V. Eskridge and Company owed the bank or owed Cross and Martindale on notes that you had executed on either the bank or to parties I have mentioned?

A. I do not know that there was anything said about it.

29 Q. Governor, do you mean to say that you never said anything to Mr. Martindale about this indebtedness, never talked to him about it?

A. Perhaps we had a little talk about it, when I came very nearly disposing of the Republican plant or real estate or something of that kind.

30 Q. Did you not go with him to bankers for the purpose of arranging to have your notes discounted?

A. No sir.

31 Q. Never went to Kansas City with him?

A. No, sir.

32 Q. Never talked over your condition?

A. No, sir.

33 Q. Positive about that?

A. Never did, I am positive about that.

34 Q. And except when you went to sell the Republican you never talked with Mr. Martindale about these matters?

A. I always regarded Mr. Martindale's judgment in regard to real estate as pretty good, and always consulted him as to whether it was a good trade or not in the event that I did trade.

35 Q. Do you mean to say that you never talked with Mr. Martindale about the condition of the Republican, about the notes you had executed to either of the banks, Martindale and Cross or Cross, except to talk with him occasionally to get his judgment as to the value of real estate?

A. No I had several offers for the Republican plant and property and building, I had offers from Kansas City, and I had an offer from Texas, I knew Mr. Martindale was pretty well posted in Texas, as well as in Kansas City and of course I desired to get his judgment, perhaps taking in connection if the trade was made why I would have a settlement with the First national bank, I knew I owed the bank something but just how much I could not tell, neither did I know.

36 Q. Did you ever execute any of these notes at the request of Mr. Martindale or when he was present?

A. Not that I remember of, I do not think so.

37 Q. Do you now swear that Mr. Martindale never brought any of these notes to you, and he was never present and discussed the subject-matter of the notes that you were signing?

50 A. No, sir, that I remember of quite well, he never brought any notes to me to sign all this business was transacted with Mr. Cross.

38 Q. I will ask you Mr. Eskridge, if on Dec. 12th, 1892, you did not execute a note of C. V. Eskridge and Company and that the whole transaction was done between you and Mr. Martindale, and the note discounted for Martindale?

A. No, sir, there was no such transaction.

39 Q. You swear that the circumstance that I have related did not occur?

A. To my knowledge it did not. I have no recollection of it.

40 Q. I will ask you if upon April 18th, 1894, you did not execute a note being for the Republican Company, and if you did not sign that and deliver it to Mr. Martindale?

A. I have no recollection of it.

41 Q. You swear that such a transaction never occurred?

A. So far as Mr. Martindale is concerned I have no recollection of it.

42 Q. Do you swear that such a transaction did not occur?

A. I may have signed such a note but I have no recollection of it.

43 Q. I am asking you this question, if you did not execute a note for $2500 signed Emporia Republican Company and deliver that note to Mr. Martindale, now did such a transaction occur?

A. I may have signed such a note but I have no recollection of ever delivering it to Mr. Martindale.

44 Q. Neither have you any recollection of the one of December 12th, for $10500 of delivering it to Mr. Martindale?

A. I may have executed a note for $10500 but I have no recollection of ever delivering it to Mr. Martindale.

45 Q. Will you swear that you never delivered it to Martindale?

A. My impression is that I did not.

46 Q. Will you now swear that you did not?

A. I never did to my recollection handle these notes with Mr. Martindale. I always handled them with Mr. Cross.

47 Q. I am not asking you about notes in general, I am referring to the note I have just mentioned for $10500, did you deliver it to Mr. Martindale?

A. I do not think I did.

48 Q. Going back Governor to the organization of the Emporia Republican you may state if you had any indebtedness at the First national bank, and if so, to what amount, and what security the bank had for the same?

A. Prior to the organization of the Emporia Republican I did not have any indebtedness to the First national bank, but I had a deposit there.

51 49 Q. Yes, now then you may state how the Republican was organized, who composed the stockholders, its capital stock and how the capital was raised if by cash, state who paid the cash, if by the notes please state who executed the same?

A. Well the Republican was organized and started with stock companies and charter was filed, which I suppose is on record up at

Topeka, and its stockholders were hands in the office, but it was never kept up, I do not remember what the capital stock was, do not think that there was any money raised.

50 Q. Did you start the Emporia Republican, simply by paying $1.50 for the charter?

A. I think that was about the size of it.

51 Q. Do you not know, Governor Eskridge, that Calvin Hood paid $5000, P. B. Plumb $5000, William Martindale $5000, H. C. Cross, $5000, and yourself $5000?

A. Yes, but they were not the parties named in the charter.

52 Q. I do not care about the charter, I am asking you how you got the capital the Emporia Republican was started with?

A. After it was started the parties you named took some stock.

53 Q. How much stock and what did they pay for it?

A. I think you made that about right.

54 Q. William Martindale paid $5000 to the Emporia Republican at the time it was started or soon after?

A. Some time along there.

55 Q. Now then from that time up until the purchase of the Emporia News did you or the Emporia Republican, or C. V. Eskridge, or C. V. Eskridge and Company execute any notes to the First national bank, Martindale and Cross, Cross and Martindale, or Cross or Martindale?

A. You have not laid the foundation yet as to the purchase of the News.

56 Q. I understood you to say in your examination Mr. H. C. Cross told you that William Martindale was interested with you and Cross in the Emporia News, did I understand you right?

A. I think you have reference to the Republican.

57 Q. You now say that William Martindale paid $5000 into the Emporia Republican?

A. I could not say that positively, whatever was done was done through H. C. Cross.

58 Q. You knew that Mr. Martindale had $5000 worth of stock in the Republican?

A. I supposed he had.

59 Q. Do you say whether he had or not?

A. I cannot swear to that now.

52 60 Q. Do you mean to say you organized a company in which there was $25,000 raised and that you do not know whether Mr. Martindale was one of the five men or not?

A. Well, of course stock may have been issued and he got that stock I could not say, I suppose the gentlemen you named had the amount you named, because some of their stock was surrendered to me and finally all of it.

61 Q. Do you mean to say that there was $25000 worth of stock issued, and that you do not know whether Mr. Martindale had $5000 of it or not?

A. I cannot swear that he had, he may have had.

62 Q. You remember now the sale of the Emporia News?

A. Well there were two or three.

63 Q. Well the first sale that was made?
A. Well Mr. Butts sold out to Mr. Stotler.
64 Q. I will start you in when Mr. Stotler was interested in the News, how was that bought if you know?
A. I think McClelland——
65 Q. Did Mr. McClelland buy that?
A. I declare I do not know just how it was at that time.
66 Q. What then, who got it when McClelland sold out his interest?
A. I think that he sold out to Newcomb.
67 Q. Was it Hamer who bought the Democrat?
A. I think it was.
68 Q. Did you execute in payment of the News a note for the benefit of Martindale?
A. No, sir, I did not.
69 Q. Did you execute a note for the Emporia Democrat?
A. I think not.
70 Q. At the time the Republican, if it ever did get the News plant or the Democrat plant you may state how it did so?
A. I think the News bought out the Democrat.
71 Q. Now go a little bit further?
A. Then I eventually bought the News.
72 Q. Who was connected with you in the purchase of the News?
A. There was not any one.
73 Q. You swear to that?
A. No, not positively, I do not know whether all of these fellows that originally had stock had withdrawn at that time or not.
74 Q. Governor Eskridge, I am asking you now upon your oath if you will swear that Mr. Martindale and Mr. Cross were not connected with you in the purchase of the News?
A. They may have had an interest in the Republican at that time. And I do not know but what Major Hood and Senator Plumb had.
75 Q. Do you not know that Senator Plumb and Major Hood donated their stock to the Republican long before that?
53 A. I do not know, I do not remember when the stock that Major Hood and Senator Plumb had was surrendered.
76 Q. Immediately after the second senatorial election was it not?
A. I do not remember of that. I think these gentlemen all took an interest in the paper, for the benefit of the town and afterwards surrendered their stock.
77 Q. Did Mr. Martindale surrender his stock, or did you buy it?
A. I think they all surrendered, not at the same time but at a little different or intermediate time.
78 Q. Did Mr. Martindale donate his stock to you or did you buy it?
A. He donated it.
79 Q. Then all the transactions that followed those of the donations of the Martindale stock was your individual transaction?
A. Yes.
80 Q. Is that correct?

A. That is correct according to my best recollection.

81 Q. Then in 1890 when you executed $50,000 worth of stock if you did execute that amount was it your individual indebtedness?

A. Well I cannot fix dates, you say 1890, I do not know whether it was at that time, before that time, or after that time, that all these interests had been surrendered.

82 Q. Did Mr. Cross, you and Mr. Martindale run the newspaper business for any length of time, in which you divided the losses equally?

A. I do not remember whether there was anything of that kind done or not.

83 Q. Do you mean to say, you cannot say whether you ever were connected with Martindale or Cross in the running of a newspaper in which the three of you divided the loss?

A. I think perhaps that before the time of surrender of their interests that we may have had an adjustment of matters equally, I left the matter with Mr. Cross.

84 Q. Governor, I will ask you to state if you ever executed an Emporia News Company note?

A. I have no recollection, I may have done it.

85 Q. You may now state Governor as nearly as you can, the date you say you assumed the entire indebtedness that had been created either at the bank or elsewhere, growing out of the newspaper transaction in which you, Cross and Martindale had been interested, I mean for you to fix the date when you will swear upon your oath when Mr. Martindale stepped out of any interest in the newspaper plant, or any of the proper connections therewith?

A. Well I could not fix the time exactly.

86 Q. Did he ever do it?

A. Yes.

54 87 Q. Give us the year if you can.

A. Well it was agreed upon verbally and we were of course to put it in a more formal shape but we never did. I think it was some time about 1890, several years ago.

88 Q. Who were the parties to your verbal agreement? Were they Martindale and Cross?

A. Mr. Martindale, Mr. Cross, Mr. Hood, Mr. Hood I think at the time had surrendered his stock. Mr. Martindale and Mr. Cross's stock was in the First national bank in the vault, simply deposited there, then laid away.

89 Q. That was in 1890?

A. It may have been later.

90 Q. Do you know Governor Eskridge that on May 2nd, 1891, H. C. Cross paid a $10,000 note that had been executed by you?

A. It was very likely he did, he ought to have.

91 Q. On November 19th, 1891, do you not know Mr. Martindale paid a ten-thousand-dollar note executed by you?

A. I do not know.

92 Q. At the time you made this agreement with Cross and Martindale, that you were to assume the indebtedness growing out of the newspaper transaction, you may state what your indebtedness

was. Either to the bank or to anybody else, that held your notes, notes given by you for indebtedness growing out of the newspaper transaction.

A. I cannot state what that indebtedness was.

93 Q. Approximate it.

A. I cannot say what it was of course it was understood a statement was to be made some time but time went on and it never was, never was.

94 Q. When did you first execute an accom-odation note, either to Cross, Martindale and Cross, or the First national bank?

A. There were pretty much all accom-odation notes.

95 Q. Why were they accom-odation notes?

A. I supposed I never owed the bank anything like the amount turned up against me.

96 Q. How long have you been engaged in giving those accommodation notes?

(*97 Q.*) From the beginning.

A. O, perhaps fifteen years more or less.

98 Q. You may state when it commenced and to what extent were they indulged in, say fifteen years ago.

A. I do not remember, not very heavy though then.

99 Q. How late was it that your indebtedness as evidence- by your notes reached fifty thousand dollars?

(—) I could not tell, I never knew how much the bank had against me.

100 Q. I believe you stated that you did not know that these notes were payable to Martindale and Cross?

55 A. I do not know who they were payable to.

101 Q. What kind of an arrangement did you have by which you were to give these notes and what were you getting for this accom-odation?

A. Getting?

102 Q. Yes. In other words how did you happen to enter into this kind of an arrangement?

A. Suppose you should get into a tight place and would like to have me sign a note for you for a little while, you know I would do (—).

(*A.*) (I have often been in tight places like that a number of times, and never called on you.)

I never doubted the ability of Mr. Cross to take care of any paper, and I signed it just as a favor without ever investigating, hardly taking any notice of it, Mr. Cross would say, Here is a note for $5000 or $10,000 I would like to have your signature.

103 Q. I asked you before and you did not make your answer satisfactory as to the amount of indebtedness you assumed when Cross and Martindale stepped out of the business, I wish that you would approximate that if you can?

A. I could not do it because I never knew, I supposed I owed the bank something but just how much I could not say, I thought probably 10.000 or $15,000 was about what I owed them.

104 Q. You know that your actual indebtedness at the time of

Cross and Martindale stepped out of the newspaper business was about fifteen thousand dollars?

A. Or it may have been twenty thousand, somewhere along there.

105 Q. Now then tell me how much you owed that is to say the amount of notes that you had executed and was in existence at the time Cross and Martindale stepped out other than the fifteen or twenty thousand dollars that you actually owed?

A. That is all the notes and everything.

106 Q. Yes.

A. I cannot say just exactly what it was, but I suppose that is all I owed the bank.

107 Q. Governor do you know that there has never been a time in the last fifteen years that you had less than fifty thousand dollars in the hands of those parties?

A. Well, I do not think in the last fifteen years there has been that much out, there may have been that much out but not fifteen years ago.

108 Q. You may state now the date as nearly as you can when you think your indebtedness will have reached fifty thousand dollars, I mean by your indebtedness the amount of notes you executed to these parties?

56 A. I do not know, I could not tell.

109 Q. You paid but little attention to the amount of notes you really signed?

A. Just left the whole thing with Mr. Cross. I asked him once or twice to get up a statement, he promised to do so, but never did.

110 Q. You then had about this kind of an arrangement, whenever you wanted money you went there and got it, and whenever they wanted notes they called on you and you signed them?

A. I never got any money from the bank nor from Mr. Cross.

111 Q. Do you mean to say that you never got any money from the bank or Mr. Cross?

A. No money.

112 Q. Well credit?

A. Well there may have been some small transactions I do not know.

113 Q. Was this entire indebtedness fictitious and not genuine?

A. There may have been a little, but what part of it was I could not say I stated a little while ago that I owed the bank about ten or fifteen thousand dollars possibly twenty, I do not think I was justly indebted to them for more than that.

114 Q. Then the balance of your paper really represented a fictitious debt that is a debt that did not exist?

A. Well that is the way that I understood it.

115 Q. Governor calling your attention again to the note that Judge Cunningham showed you marked Exhibit Two, you may state what that represented if anything?

A. Well, I could not say, that may have represented a portion of this indebtedness, due from me to the bank but I could not say whether it does or not.

116 Q. It may have represented a portion of the indebtedness you

assumed when Martindale and Cross stepped out of the newspaper business?

A. Yes.

117 Q. Now I will ask you to examine the note bearing date October 24th I think marked Exhibit Three, you may state what indebtedness this note represented if any?

A. Well it stands in just the same position as the other.

118 Q. That is it may be a part of the indebtedness that you assumed when Martindale and Cross went out of the newspaper business or may represent some of the accom-odation notes that you gave to Mr. Cross?

A. I think it largely accom-odation.

119 Q. Governor, I wish that you would give it more in detail if you can, that is to say, try and separate your actual indebt-
57 edness at the time Cross and Martindale went out of this enterprise from the fictitious indebtedness? I know that you cannot do it accurately, but approximate it the best you can?

A. I think I owed the bank not to exceed twenty thousand dollars. Perhaps not that, I could not say what I owed them, perhaps legitimately fifteen thousand is somewhere about what I thought I owed them.

120 Q. Whatever its excess of say twenty thousand dollars, at the time you say you assumed this indebtedness, would be accom-odation paper?

A. Well that is what I would think.

121 Q. Would that be true at all times, from the time you commenced borrowing money up there by giving your notes?

A. Well I think so.

122 Q. You do not think that your genuine indebtedness ever exceeded twenty thousand dollars?

A. No, I should think not. In figuring up the interest and notes signed, and in one way and another, I could not tell how the bank books could show up.

123 Q. I do not know that I understand, you say when the newspaper business was started you stated Plumb and Hood going into it, is this true? They simply took stock in the Republican quite a while after it was organized?

A. Yes.

124 Q. How long after?

A. I do not know how long after.

125 Q. They were not in the organization?

A. No.

126 Q. Then if I understand it, it was incorporated principally by men in the office?

A. Yes, sir.

127 Q. Now Martindale and Mr. Cross were connected with you from the start in the newspaper business?

A. Yes.

128 Q. Did you start it yourself?

A. No. They took an interest in the ground and building.

128 Q. They just took an interest in the ground and buildings, and some stock in the Republican?

A. Yes.

130 Q. But getting the paper started was your own enterprise?

A. Yes.

131 Q. Of course they had nothing to do with that?

A. No.

132 Q. They finally had some interest in the erection of the building and purchase of the grounds?

A. Yes.

133 Q. Is that correct?

A. Yes.

134 Q. You started the newspaper business yourself? After organizing a company the stockholders of which were men in your office, afterwards Martindale and Cross took some interest in the purchase of a lot and the erection of the buildings which they did it for the good of the town?

A. Yes.

135 Q. You never knew of Mr. Martindale's connection with it, I understood you to say except as you got it from Cross?

A. Yes.

58 136 Q. Now in any of your business transactions up to the time they went out of it you never knew of Martindale being connected with it except as Cross told you?

A. Only from inference and from what Cross stated.

137 Q. Now in this real-estate purchase, and helping to put up the building did you have any (*inclination*) that Martindale was connected with that, except by inference and what Cross stated?

A. Cross told me he would get Martindale in to help.

138 Q. You never knew whether he did or not?

A. Well as a matter of fact, I just inferred that Martindale was interested in the plant, Mr. Martindale, Mr. Cross, myself and Mr. Severy, at one time were interested all together.

139 Q. How do you mean that Mr. Martindale was interested altogether with you except by hearsay?

A. That is (*the*) in the plant, what are you speaking of now?

140 Q. I am speaking of anything connected with the newspaper they were interested in, the purchase of the land, the building of the building and as stockholders in the Republican?

A. Yes.

141 Q. And as a stockholder in the Republican I believe you say?

A. Never knew that Mr. Martindale was except as Cross told me.

142 Q. Are you positive of it?

A. That is my impression.

143 Q. All of Mr. Martindale's connection was second-handed, or you got it through Cross?

A. All excepting I knew Mr. Martindale held an interest in the grounds and buildings, as Mr. Cross had, and Mr. Severy had.

144 Q. Now Governor did you not run that newspaper as a kind of a partnership, for Cross and Martindale from the beginning?

A. Well we never had any understanding to that effect.

145 Q. Never had any understanding to that, do you swear to that?

A. I think so.

146 Q. I will ask you one question about your signature, did you sign that?

A. That is my signature.

147 Q. Are you familiar with William Martindale's signature? Is that his signature?

A. I do not know whether that is Mr. Martindale's signature or not.

148 Q. You know it do you not?

A. He writes differently at times.

149 Q. Well you know his signature do you not?

A. I cannot swear to it.

59 150 Q. You may state Governor how much money if any was paid to you and placed on deposit in the First national bank on that contract?

A. That contract or whatever you may call it has been a dead letter, just as the charter that was filed, I could not tell how much money.

EXHIBIT "4." W. N. S., Com.

Whereas, in order that the city of Emporia, and Lyon county, may have a true Republican paper, that will defend the lifelong principles of the Republican party and at the same time aid in putting down all corruption and corrupt rings known to exist in said county and city. And in order that said Republican party may have a true and honest paper that it can at all times rely upon in both local and national affairs and which will advocate honest men for position only, without fear or favor; and

Whereas, it is proposed to form a copartnership between C. V. Eskridge, Wm. Martindale, Luther Severy and H. C. Cross for the purpose of publishing such newspaper as per articles of agreement hereinafter set forth; and as said Martindale Severy and Cross are engaged exclusively in commercial pursuits, and are not desirous of being mixed up in political matters and while at the same time they believe it to be their duty as good citizens and tax-payers to assist in establishing a true and honest Republican paper that will advocate the election of honest men to office only, therefore it is agreed between all parties to the contract of copartnership hereinafter set forth that said parties will forever keep as a matter of secrecy the connection of said Martindale, Severy and Cross therewith; and,

Whereas, the said Martindale, Severy and Cross, for the sole and only reasons above given and for the purpose of carrying out the above objects and publishing said newspaper, and having full confidence in the ability, honesty and integrity of the said C. V. Eskridge, as editor and business manager of said newspaper, do hereby enter into the following articles of copartnership, to wit:

Know all men by these presents, that C. V. Eskridge, William

Martindale, Luther Severy and H. C. Cross, do hereby form a copartnership to exist for the term of five years unless sooner dissolved as hereinafter provided by this contract, for the purpose of publishing a weekly and daily newspaper, in the city of Emporia, Lyon county, Kansas, and together therewith doing a general job printing and book-binding business.

60 It is also hereby agreed between the said C. V. Eskridge, William Martindale, Luther Severy and H. C. Cross, that the firm name of said parties hereto shall be known as C. V. Eskridge, under which name all business connected with the publication of said newspaper, job printing and binding shall be done; and under said name of C. V. Eskridge all contracts shall be made of any and all business pertaining to this copartnership.

It is further agreed between all parties hereto that all profits or losses sustained under this contract by reason of the publication of said newspaper, job printing and book-binding shall be equally divided or sustained by the parties hereto.

It is further agreed that each party hereto shall contribute an equal amount to the capital stock of this partnership not exceeding the sum of $1500 fifteen hundred dollars, each, unless increased by the mutual consent of a majority of the parties hereto.

It is further agreed that said Eskridge shall be the business manager of said copartnership and editor-in-chief of said newspaper.

It is further agreed that said newspaper to be hereby published shall be known as the "Emporia Republican."

It is further agreed that said Eskridge shall be editor-in-chief of said paper and general manager thereof, but that its political status, and the persons to be supported by said paper for any position of trust or for any office, shall be determined by a majority of the parties to this contract, but in the absence of such determination the said Eskridge as editor-in-chief, may support such men and measures, as he may deem to be for the interest of said paper, and consistent with the position of the paper as a Republican journal, and it is expressly understood that the paper proposed thus to be established shall never advocate any measure or person except in an honorable and legitimate way for the promotion of the public interest.

It is further agreed that the parties hereto shall deposit in the First National Bank of Emporia, Kansas, to the credit of the "Emporia Republican" in equal proportions, such sum of money as may be necessary for the carrying out of the publication of said paper on which account or deposit said Eskridge is authorized to draw for the purpose of establishing and maintaining said paper, printing and *building* establishment and all moneys received by said Eskridge or any of the parties hereto, resulting from the publication of said paper shall be deposited to the credit of said account in said bank, or to be otherwise accounted for.

61 It is further agreed that meetings for the management of said paper and other business connected therewith, may be held at any time at the office of said paper or other agreed place, in the city of Emporia, upon the call of any of the parties to this con-

tract, by notice in person or by letter addressed to the parties hereto at their usual place of receiving their mail, postpaid.

It is further agreed that said Eskridge shall receive for his services, as business manager and editor-in-chief, the sum of twelve hundred dollars ($1,200) per year, it is further agreed that this copartnership may be terminated at any time after one year, upon the agreement of any three parties hereto, after twelve months' notice, and if not dissolved before five years it may be continued thereafter by endorsing hereon the following "Continued until dissolved by a majority of the parties to this contract upon year's notice being given to remaining partners in writing by the partners desiring a dissolution of the firm."

It is further agreed that any party to this contract may retire therefrom after three years, upon giving notice for twelve months in writing to the remaining partners. Upon so retiring the remaining partners shall have the privilege of purchasing the interest of the retiring partner at an agreed price between all parties hereto. If price of interest of retiring partner cannot be agreed upon between parties hereto, it shall be determined by a commission of three to be appointed as follows: one person by retiring partner, and one by remaining partners and the two persons thus appointed shall appoint a third person, the three persons thus appointed shall proceed to determine the interest of such retiring partner, and its cash value which interest may be purchased at price thus agreed upon, by the remaining partners, upon refusal so to purchase this copartnership may be dissolved. This partnership may also be dissolved at any time by consent of all parties hereto.

It is further agreed that no party to this contract can sell or dispose of his interest herein except as above provided.

It is further agreed by and between all parties to this contract that no party hereto can obligate or bind in any way this company in anything or matter whatever not directly pertaining to the business as provided in this contract.

It is further agreed that the manager of this company C. V. Eskridge shall annually or oftener if required, render to this com-
62 pany a true inventory of the property and financial condition of said company and it shall be within the power of a majority of said company to make such distribution of net earnings, if any, as in their judgment may be expedient, for mutual interests.

It is further agreed that all books, papers and accounts belonging to said company shall be open for the inspection of any party to this contract at any and all times.

It is further agreed that any franchises or rights belonging to this paper or company shall be equally the property of all the parties hereto.

It is further agreed that any rights or contracts for news by telegraph or otherwise for the use of this paper and company shall be taken in the name of C. V. Eskridge, as the name of this company hereby organized, and that all such rights and contracts for press dispatches by telegraph or otherwise, shall be the joint property of all parties hereto and cannot be sold or otherwise disposed of only

upon consent of a majority of the parties to this contract. The above is meant to include all rights or privileges for news received by said paper or company in any manner whatever and from any source whatever.

It is further agreed that no purchase or contract shall be entered into by said Eskridge in any sum over five hundred dollars, without consent of a majority of the parties hereto.

The above contract is executed in duplicate, one copy retained by said C. V. Eskridge, and the other copy to be placed or deposited in the First National Bank of Emporia, Kansas, for free access by said Martindale, Severy and Cross.

Witness our hands this second day of January, 1882.

C. V. ESKRIDGE.
W. MARTINDALE.
L. SEVERY.
H. C. CROSS.

151 Q. Was there any money placed in bank on that contract?

A. I think not that is my impression.

152 Q. Now I will ask you if this is not correct, this contract is in your handwriting, is it not Governor?

A. I think not, no sir.

153 Q. I thought it was, it looks like it was.

A. Let me see it. Excuse me this is in my handwriting.

154 Q. These endorsements here are also in your handwriting on the back?

A. Well as a matter of fact I do not remember there was anything paid in, those amounts may have been endorsed on there as a sort of a memorandum, or something of that kind.

63 155 Q. Governor, I will ask you if these endorsements were not made by you.

Paid on above contract	$1500	H. C. Cross.
" " " "	1500	L. Severy.
" " " "	1500	C. V. Eskridge.
" " " "	1500	Wm. Martindale.
Paid additional on within contract	1000	H. C. Cross.
Paid additional on within contract	1000	L. Severy.
Paid additional on within contract	1000	C. V. Eskridge.
Paid on within contract	1000	W. Martindale, per Cross.
Paid additional on within contract	1500	L. Severy.
Paid additional on with- contract	1500	W. Martindale, per Cross.
Paid additional on with- contract	1500	C. V. Eskridge.
Paid additional on within contract	1500	H. C. Cross.
Paid additional on within contract	1222.84	H. C. Cross.
Paid on the within contract	1222.84	W. Martindale, per Cross.
Paid on within contract	1222.84	L. Severy, per Cross.
Paid on within contract	1222.84	C. V. Eskridge, per Cross.
November 4th, 1882—Paid additional on within contract	3000	H. C. Cross.
Paid on additional on within contract	3000	W. Martindale, per Cross.
Paid on within contract	3000	L. Severy, per Cross.
Paid on within contract	3000	C. V. Eskridge.

Now Governor, tell us who made them?

A. It seems that Mr. H. C. Cross made the most of them, most of them, I guess.

156 Q. All of them?

A. No.

157 Q. Well which ones?

A. I cannot answer to any except my own.

158 Q. I will ask you as to one signature, is that William Martindale's signature, to the fifteen-hundred-dollar endorsement (hands contract to witness).

A. Well I suppose Mr. Martindale is accessible and could answer for himself, I might be mistaken.

159 Q. Well give a guess at it.

A It looks something like Mr. Martindale's signature.

160 Q. I will ask you Governor assuming that this total $32891.36 is correct. I will ask you if that amount was placed to your credit at the First national bank?

A. I do not know.

161 Q. I will ask you if it was placed to your credit and placed there by a discount of notes? And if this is not the beginning of the Emporia Republican and C. V. Eskridge and Company's indebtedness?

A. I cannot say as to that.

64 162 Q. Governor, when you state that Mr. Martindale had no connection with this that you knew of was that because you wanted to comply with the terms of that contract, or was it because it was so long ago that you had forgotten it?

A. Well as I stated, the contract has always been a dead letter, as was the charter organizing the company, because all considered at some time later, that they had no interest in the matter.

162 Q. Was the payment on that contract of $32,000 a dead letter?

A. I do not think it was ever paid, as a matter of fact it may have been a sort of running imaginary payment or something, but I do not think the money was ever paid.

163 Q. Well what kind of a game was it, you were playing, between yourselves by entering into a solemnly written agreement and signing it, you did not expect to use this contract anywhere else did you?

A. No.

164 Q. If the books of the bank show this amount was paid in there and placed to the credit of C. V. Eskridge upon the day as endorsed on that contract, would you say that part of it was a dead letter?

A. You are stating what the books of the First National show.

165 Q. I am asking you this question.

A. I assume the books would be all right.

166 Q. I am asking you if the books of the bank show that amount paid you would certainly have received that credit?

A. I do not know.

167 Q. Was this $32,000 placed to your credit or not?

A. I cannot swear to what the books of the bank show.

168 Q. Governor I will ask you now to state if that amount was not placed to your credit?

A. Well now I could not say, I think probably quite a large amount was placed to my credit.

169 Q. Then, was not that credit derived by executing notes, and was not that the foundation of the Eskridge indebtedness?

A. I could not say as to that. I do not remember. I could not say what the foundation of the Eskridge indebtedness was, it seemed to me to grow up in a night.

170 Q. You notice this part of the agreement, "It is further agreed, any parties to this contract may retire therefrom after three years, upon giving notice for twelve months in writing to the remaining partners" you may now state if any member to this agreement ever gave you any written notice of the kind and description, required by this part of the contract?

A. Never paid any attention to that contract after it was signed up.

65 Redirect examination:

1 Q. You say that your best judgment is that you owed the First national bank at the time of its failure $20,000 or not to exceed $20,000?

A. I suppose about fifteen or twenty thousand.

2 Q. I will ask you if the two notes that have been exhibited to you are a part of that amount?

A. Well I could not say I owed that much, I signed that note and could not say how it should be applied.

3 Q. What I want to know is, you say that your judgment is you owe the bank about twenty thousand dollars, was that in addition to these two notes, making all together 40,000?

A. No that was without regard to those two notes or any other notes.

4 Q. The amount which you assumed to pay upon the practical dissolution of the Emporia Republican Company became an obligation of yours to the First national bank as I understand it.

A. Well I do not know, I could not say how it was applied.

5 Q. Did you give any note for that to William Martindale?

A. No, nor to Major Hood, nor to any of them, I was to assume the indebtedness, and they were to turn the property over to me, they were to fix it up some time, but generally when one was here the other was away and the matter just kept drifting along.

6 Q. From that time forward your dealings relative to this matter were had with C. S. Cross, were they not?

A. Yes they were.

7 Q. He was during all this time either president or cashier of the First national bank?

A. President.

8 Q. Was there during this time any question in your mind as to the complete and entire solvency of the First national bank or C. S. Cross?

A. Never had the least question about it.

(In addition to the reasons heretofore given we object to this as calling for a conclusion and not a statement of facts.—)

9 Q. I will ask you to look at these notes again, and state if you can in whose handwriting the body of the notes are?

A. Mr. Cross's.

10 Q. C. S. Cross?

A. To the best of my knowledge C. S. Cross.

Recross-examination:

11 Q. At the time you assumed all of this indebtedness,
66 when Cross and Martindale went out of the newspaper business with you, did you assume everything fictitious and genuine, without knowing the amount of either?

A. I assumed what I considered to be legitimate indebtedness; I did not know what that was, of course I did not suppose anything else was in existence, I supposed of course Mr. Cross would take care of this and we hoped to have a settlement some time but we never did.

12 Q. You never did separate, and cannot now the genuine from the fictitious?

A. No I could not.

Testimony of C. V. Eskridge.

Examination by I. E. LAMBERT:

1 Q. I understood you to say that the agreement which you heard read during the forenoon became a dead letter and that Mr. Martindale never had anything to do with the Emporia Republican or the C. V. Eskridge matter except as a stockholder for a short time in the Emporia Republican. Is that correct?

A. That is my recollection of it.

2 Q. You are quite positive. And I think I asked you before that Martindale never had anything to do with any of these notes that you signed for the Republican C. V. Eskridge and for the accommodation of Mr. Cross?

A. I don't know anything about the accommodation of Mr. Cross. I could not say as to the accommodation of Mr. Cross, but I never had any knowledge that he ever had anything to do with the notes.

3 Q. I think you stated that you were quite positive that you never at any time signed a note or notes and delivered them to Martindale or delivered them in his presence.

A. Well, Martindale might have been in the office, but the notes were not signed with his supervision.

4 Q. Not with your knowledge so far as you know?

A. No.

5 Q. Did not you and Cross and Martindale sign notes together; talk them over together; notes given for the indebtedness of the Republican?

A. I did the business with Cross and whether Cross got Martindale to sign anything I do not remember.

6 Q. Is it your recollection that in all of these note transactions you never discussed or took part with Mr. Martindale in the signing of any of these notes?

A. I do not remember of it. If he did it was after I had left. That is my recollection of it.

7 Q. I will ask you, Governor, if that is your signature?

(Document submitted to witness.)

A. That appears to be, but I do not remember of Mr. Martindale signing it in my presence.

67 Document in question offered in evidence and is as follows:

"H. C. Cross, president; William Martindale, vice-president; C. S. Cross, cashier.

FIRST NATIONAL BANK.
EMPORIA, KANSAS, *June 2nd*, 1888.

We have this day executed to the First National Bank of Ironton, Ohio, our joint note of ten thousand dollars ($10,000) payable five five months after date at the First National Bank of Emporia, Kansas. Said note is endorsed by the Emporia Republican Company, by C. V. Eskridge, president. Said note is given for the Emporia Republican Company, and is by us treated as said company's note and we as endorsers jointly.

C. V. ESKRIDGE.
WILLIAM MARTINDALE.
H. C. CROSS.

Approved by
C. V. ESKRIDGE,
President of the Emporia Republican Company."

8 Q. Governor, please state under what agreement if the original contract between you, Severy, Cross and Martindale was a dead letter, that you were operating under when you made this note and executed this agreement?

A. I suppose that paper was drawn up by Mr. Cross. It is in his handwriting and it was done, I suppose, because he wanted to use it.

9 Q. You think this was an accommodation note?

A. I think it was.

10 Q. Well you approved it after Martindale's name was signed to it.

A. That I do not remember. These notes were done up in a very confidential—or in confidence and names were perhaps attached after I had signed. I expect that was frequently the case. I do not know that Mr. Martindale was present. I would perhaps sign some notes and leave them to Mr. Cross to complete.

11 Q. Your name appears first and last.

A. Yes, it may have been first and last.

12 Q. Well, you knew what you were signing when you signed it?

A. I signed something of that kind.

13 Q. Well, you knew you had a note in the Ironton bank?

A. Well, this is the first recollection I have had in the last eighteen years and it looks like it had been there. Whether the signature was attached in my presence or not, I do not remember.

14 Q. You knew from this article itself that it was an extension of the note signed Emporia Republican, C. V. Eskridge, William Martindale and H. C. Cross, did you not?

A. Well, the probability was that I signed it.

15 Q. After reflection don't you know, Governor, that Mr. Martindale endorsed notes frequently executed by you from the time the Republican was started up to the time the bank failed?

68 A. I only know it after seeing the notes when they were returned to me.

16 Q. State when you first observed this.

A. Oh I could not do that. I do not know.

17 Q. Approximate it.

A. I do not know. I am not good on dates.

18 Q. Don't you know, Governor, that from the time you entered into the written agreement that was read this morning up to the time of the death of H. C. Cross that William Martindale had the same interest in the paper executed by you there signed Eskridge or Eskridge & Co. or Emporia Republican, that H. C. Cross had?

A. I do not think H. C. Cross had any interest in it.

19 Q. Didn't you start in with H. C. Cross and William Martindale having the same interest in the Republican?

A. Well what do you mean. They had the same interest in the realty. I don't know. I couldn't tell. The business was all done through Mr. Cross. Mr. Martindale never claimed to have any interest in the paper only as an accommodation to Mr. Cross in helping it out.

20 Q. You entered into an agreement to establish a newspaper in this town with H. C. Cross and William Martindale, didn't you, and Severy?

A. Yes.

21 Q. Until there was some arrangement to the contrary Mr. Martindale had the same interest in that paper that Cross did, didn't he?

A. Well I don't know. That was a matter between him and Cross.

22 Q. Why do you say it was a matter between him and Cross when Martindale signs the agreement the same as Cross, puts in his $8200.00 the same as Cross, and you all borrowed it of the bank, now then if this $32,000 was paid under this agreement, each paying his part of it, why do you say that Martindale did not have the same interest in it?

A. Mr. Cross always told me that he would see Martindale and get him interested. That he would also see Maj. Hood, Col. Plumb and others.

23 Q. Well, didn't you think Cross had seen him when he signed this written agreement to go into a partnership with C. V. Eskridge and you all borrowed this money?

A. I suppose he had if that is Martindale's signature.

24 Q. Now, Governor, again in 1888 you all signed a joint obligation to take care of a ten-thousand-dollar note executed by the Emporia Republican?

A. There are several of those notes.

25 Q. Don't you know that you executed a written agree-
69 ment jointly with Mr. Martindale in 1888 agreeing to protect individually a ten-thousand-dollar note of the Emporia Republican?

A. Well, I presume we agreed to protect a ten-thousand-dollar note, but because it was signed a ten-thousand-dollar note, that would not cut much figure.

26 Q. What was that ten thousand dollars for?

A. I do not remember.

27 Q. Were you engaged then jointly in executing fictitious paper to the First national bank and having that paper discounted?

A. I had no knowledge that it was fictitious.

28 Q. Were you furnishing them paper that was fictitious?

A. Well, if they wanted my note they could have it.

29 Q. I understood you to say a moment ago that that written agreement was written by Mr. Cross. I will ask you to examine it now and say if you did not write it yourself.

A. No, sir, that is not my handwriting. I can see well enough for that.

30 Q. Governor, you will notice in that paper that you jointly agree to pay that note. Now did you intend that joint agreement of yours to operate as a valid agreement to pay the note, or was it simply an agreement that did not mean anything?

A. Well, I suppose that just what that paper says, that meant.

31 Q. Please state now what interest Mr. Martindale had that caused him to sign that paper if you know?

A. I do not know without it was an accommodation to Mr. Cross.

32 Q. What makes you think it was an accommodation to Mr. Cross?

A. Well, I think Mr. Martindale would do most anything to accommodate Mr. Cross, and Mr. Cross would do most anything to accommodate Mr. Martindale.

33 Q. Then you might just as well say that Mr. Cross signed it because Mr. Martindale wanted him to?

A. No sir.

34 Q. That would not protect Martindale in this lawsuit?

A. I don't know what this lawsuit is about.

35 Q. But you do know at that time that Mr. Martindale had the same interest in the Emporia Republican that Cross had?

A. Well now, I couldn't swear to that.

36 Q. Well, you believe it?

A. Well, I have an impression, but I can't swear to it positively.

Redirect examination.

By Judge CUNNINGHAM:

1 Q. How long, if at all was the Emporia Republican run under the agreement which (*had*) been introduced in evidence bearing date January 2, 1888?

70 A. Well I cannot say but by verbal agreements etc. that agreement became a dead letter and should have been delivered with the stock and others papers years ago.

2 Q. Can you not now give some approximate estimate of the length of time if at all the Emporia Republican was run under this agreement?

A. No I couldn't state, Judge.

3 Q. I see by the terms of this agreement that each of four-named persons was to pay $1500.00. Was there a subsequent arrangement by which it was agreed that these persons were each to pay in $6722.84 in addition to that sum?

A. I do not remember that that was ever paid in.

4 Q. Do you now know in whose possession this document of date January 2nd, 1882 and which has been read here has been since the time it was executed?

A. Well, I can express an opinion. All these papers pertaining to the Republican, I had them placed in a tin box and set in the First National Bank vault. Properly these notes should have been delivered to me, but they were not and time run on, Mr. Cross, when he was here, was generally busy and he was away a good deal. The papers were still kept in the vault in the bank. I supposed that when I could get Mr. Cross at home and at leisure he would give them to me. The time run on and so far as I was concerned I felt no particular anxiety, believing that they were as safe in Mr. Cross's hands as in my own. I could get them most any time if I had insisted on having them.

By Mr. LAMBERT:

5 Q. What became of the copy that you retained of that contract?

A. Well I presume it is among some old papers somewhere.

6 Q. Didn't I understand you to say they surrendered to you all of the Emporia Republican stock?

A. Verbally, but I think at the time it was done. But it was with the other papers. It was never formally surrendered, but their main interest and object was to establish a morning paper.

7 Q. When you assumed the indebtedness did that include the $32,000 that was borrowed to establish the paper?

A. Indeed Mr. Lambert, I do not now just know what it did include, but whatever it was.

C. V. ESKRIDGE.

THOMAS EVANS is produced on behalf of the complainant, and the cross-complainant The First National Bank of New York, and Forde Harvey. Being first duly sworn, he deposes and says:

Examination by CUNNINGHAM:

1 Q. State your name, age and residence?

A. Thomas Evans, forty-three years old, Emporia.

2 Q. State if you knew C. S. Cross in his lifetime?

A. I did.

3 Q. State if you were in his employ at any time and if so, state when you commenced and how long you continued, and the nature of the employment.

A. I commenced to work for C. S. Cross on the 18th day of June, 1898, worked for him until his death, as the manager of Sunny Slope farm.

4 Q. What was the nature of your duties as manager of Sunny Slope farm, and what the nature and extent of the business carried on on the Sunny Slope farm?

71 A. Raising, breeding, registered Hereford cattle, and selling the same. At the time that I was there up to the time that Mr. Cross died it was the quiet time of the year for sale and there wasn't very many sales made.

5 Q. How many acres were in the Sunny Slope farm?

A. Six hundred acres belonging to the farm proper. Leased land and the farm proper amounts to about 2200 acres, I think.

6 Q. Was this land all under your charge as manager?

A. Yes, sir, I looked after it.

7 Q. How much of it was cropped?

A. It was 160 acres of alfalfa, 80 acres of cane, about 600 acres prairie hay put up. The balance of land, pasture.

8 Q. How large a herd of cattle did you have there?

A. About 350 head. That included the pure breeds, registered cattle and the grades.

9 Q. How many hands were employed during the summer of 1898?

A. From twelve to twenty.

10 Q. From the time you took charge up to the time of the death of Mr. Cross who paid these hands?

A. I wrote the checks on the First national bank.

11 Q. Well, was it your money or Mr. Cross' money?

A. It wasn't mine.

12 Q. Who was operating it there during that time as the owner?

A. C. S. Cross.

13 Q. Did you keep this relationship during the entire time that you were there?

A. Yes, sir.

14 Q. At any time during your services was there any change of ownership or management of the farm and the cattle thereon—business generally up to the time of his death?

A. No, sir.

15 Q. Were there any sales of cattle made by Mr. Cross during that time?

A. There were.

16 Q. Who was it that directed when there should be sales and what should be sold—Mr. Cross or some one else?

A. Mr. Cross.

17 Q. Was there any one during this time and up to the time of Mr. Cross' death assuming to control the affairs of Sunny Slope?

A. There was not.

18 Q. After Mr. Cross' death what, if anything occurred between you and Mr. Martindale relative to the possession of the property upon Sunny Slope farm?

A. The afternoon of Mr. Cross' death he told me to see that everything was taken care of as usual. A few days later at his home (he) said that he had a bill of sale of all of the stock on Sunny Slope. He wanted I should take charge of it and take care of it as I had taken care of it before, and the sale to go on as advertised. A few days after that again he mentioned the same thing in his own house.

(Motion by Judge Buck.)

The defendant Newman moves to strike out of the statements just made by this witness with reference to any conversation between himself and Mr. Martindale and especially so much thereof as says anything about bills of sale and in relation to the anticipated sales of the stock in the future for the reason that the same is immaterial, irrelevant, incompetent, not the best evidence, and hearsay, and not responsive to the question asked.

(Examination continued by Judge CUNNINGHAM:)

19 Q. State whether or not you complied with this request of Mr. Martindale?

A. I did.

72 20 Q. Up to what time did you hold possession of that property for Mr. Martindale?

(Motion for Judge Buck.)

The defendant Newman objects to this question for all the reasons above assigned and in addition thereto that the same calls for an opinion and not a statement of facts and it involves a legal conclusion which is not the province of the witness to draw.

A. Up to the time that Mr. Jobes came and demanded possession of the same; and Mr. Lambert.

21 Q. By what rights did Mr. Jobes and Mr. Lambert claim possession of this property, if they made any claim of right?

A. They did, but I do not believe I can state it. It was for the First national bank.

22 Q. You spoke about a sale having been advertised. Who advertised this sale?

A. C. S. Cross.

23 Q. How long had the advertisement been running, if you know?

A. About ten days or two weeks.
24 Q. When was the sale advertised to take place?
A. 8th of December, last year.
25 Q. Do you know whether or not it did take place?
A. Yes, sir.
26 Q. Under whose direction and care did it take place?

(Motion by Judge Buck.)

Defendant Newman objects to last question for the reasons above given in all of the previous objections and because the same is not the best evidence, and that the whole matter is controlled by written stipulation between the parties hereto.

A. Under the direction of C. S. Jobes and Mr. Newman, who seemed to be connected with it, I received the money for the expenses from C. S. Jobes.

Cross-examination.

By Judge BUCK:

1 Q. You have lived in Lyon county, and been at one time its sheriff, and for a number of years quite well acquainted out and around the city of Emporia, have you not?
A. Yes, sir.
2 Q. You knew well, did you not, that up to the time of his death, C. S. Cross was and for many years had been president of the First National Bank of Emporia?
A. I did.
3 Q. You also knew, did you not, that Mr. Martindale was at the time of Cross' death and for some time prior thereto (—) been the vice-president of that bank?
A. I did.
73 4 Q. You knew, did you not, that in the absence of Charlie Cross, Martindale frequently took charge of and gave directions at the bank concerning matters thereof?
A. I did not.
5 Q. Did not Martindale also at times during Cross' life give direction of matters at Sunny Slope?
A. He never did. He gave suggestions but never any directions.
6 Q. You stated that you personally paid the hands?
A. Yes, sir.
7 Q. I ask you if the payments were habitually made by checks drawn like any ordinary check to the payee on the First national bank and signed by yourself as manager or some other designation?
A. Yes, sir. They were designated Sunny Slope farm.
8 Q. Like you have seen some of us lawyers.
A. Like some of the business men.
9 Q. Cross died on the Sunny Slope farm in the house there just about one o'clock p. m., November 16, 1898, did he?
A. Yes, sir.
11 Q. Were you there at the time?
A. Yes, sir.

11 Q. How long before his body was removed to his late residence?

A. Why, I think it must have been somewhere between three and four.

11 Q. Did you come to town that afternoon?

A. No I think not. I don't remember.

13 Q. When did you come to town for the first time after Cross' death?

A. I do not know. I was here at the funeral, but I do not know when was the first time.

14 Q. Can you say you were in town between his death and the funeral?

A. No, I cannot.

15 Q. You learned, did you not, some time that day (November 16) that the proper officer of the United States had closed the bank?

A. Yes, I learned some time that evening.

16 Q. You had known, had you not, that C. S. Jobes had been at the bank some days in the capacity of the bank examiner?

A. Previous to the time of his death? I did not.

17 Q. How soon after Cross' death did you learn from any source that C. S. Jobes was in charge of the bank?

A. Some time that evening, along about six o'clock, I should judge.

18 Q. You understood then, did you not that he had it in charge in the capacity of receiver or assignee?

A. I understood nothing about it but that he had closed the bank for the Government as receiver.

74 19 Q. How soon did you hear that Jobes was receiver (acting receiver)?

A. That evening.

20 Q. How soon after Charlie Cross' funeral was it that you saw Martindale at Martindale's house?

A. The next day.

21 Q. When was it with reference to your seeing Martindale at his house that C. S. Jobes and I. E. Lambert, his attorney, were there at Sunny Slope to see you?

A. Not positive, but I think it was two weeks from the next Monday morning after seeing Mr. Martindale at his house.

22 Q. You had seen Jobes, however, before that time?

A. Oh, yes sir.

23 Q. Had sold some little stock?

A. I think—yes. I am not quite certain, but think we had.

24 Q. After being at Martindale's house upon the occasion mentioned you sold two calves on the Sunny Slope place of that stock?

A. Well, I don't know whether it was at the time that intervened between the time I talked with Mr. Martindale at his house and the time that Mr. Jobes took possession.

25 Q. How much did you sell the calves for?

A. Five hundred dollars. One was a bull and one was a heifer.

26 Q. How soon after selling them did you go with the proceeds to the bank?

A. On receiving the proceeds. Mr. Jobes had taken possession then.

27 Q. Did you receive payment for these calves on the day of selling them or later?

A. On the day they were delivered. I delivered them at Hartford.

28 Q. How long a time was it after you sold these calves before you delivered them at Hartford and received the pay?

A. It was several days. I do not know how long.

29 Q. Give your best judgment by the number of days.

A. Oh, I should judge within ten days.

30 Q. At the time of selling these calves you did not ask the advice or opinion or authority of any one in relation to selling them, did you other than the general scope and authority and consequent responsibility that you had received and that was imposed on you by your first being placed in charge there by Charlie Cross?

A. I did not.

31 Q. If you can now give the exact number of days between the funeral of Cross and your agreement and sale of the calves, do so, and if not, do the best you can.

A. I can't.

32 Q. The time was short at least, was it not?

A. Within ten days or two weeks.

33 Q. I understood you that it (—) probably about ten days between the selling and delivery of the calves.

75 A. Inside of ten days I should judge.

34 Q. These two calves, as I understand, were sold after Cross' funeral?

A. The party was here at the time of the funeral I think. He was either here at the time or the next day. I think he came out to the ranch that night. He had been here before.

35 Q. It is a fact, is it not that you consulted with C. S. Jobes about delivering these calves?

A. I think I did.

36 Q. It is also true, is it not, that you consulted with him about the sale of the calves?

A. I rather think I did. I think I talked with him and Mr. Newman both.

37 Q. Is it not a fact that you sold these calves after consultation with Jobes, that you consulted with him afterwards about the delivery of them and that you afterwards paid the proceeds of them to him, and all before Jobes and Lambert went out there to take possession?

A. I think not.

38 Q. Newman was appointed administrator ten days after Cross' death, to wit, on the 26th of November. I will now ask you if Jobes did not come out there and take formal possession on the 28th of November?

A. I could not tell the date, Judge.

39 Q. Well, when you paid the money to Jobes, Newman was not then, so far as you know, administrator?

A. Well I don't remember, but I suppose I would find out about as soon (—) anybody.

40 Q. Go back a little. You took possession out there at the time Cross and Henry Leibfried were in litigation and struggling each to maintain possession there?

A. I did.

41 Q. And were selected in part because it was expected your experience in civil affairs would induce your employers to believe that you would hold on against all incumbrance?

A. I wasn't consulted with regard to my ability to do things.

42 Q. Except that Charlie Cross was there, as I suppose that he frequently was, you were recognized as the person having sole charge?

A. Yes sir.

43 Q. And after the sudden death of Cross you thought it your duty to remain, and did?

A. Yes sir.

44 Q. I will ask you if any observant man or set of men visiting at any time from the first of October, 1898, up to the time that Lambert and Jobes were out there, could he or they have discovered any visible change in the possession of that ranch?

A. I think not.

45 Q. I will ask you if before Newman was appointed administrator, or before you knew of his appointment, you ever consulted with a single person besides C. S. Jobes of the management of things out there unless it might have been with the Cross widow?

76 A. Mr. Jobes, Mrs. Cross and Mr. Martindale separately.

46 Q. When Lambert and Jobes went out you did not say anything to them or either of them about what Martindale had said about a bill of sale?

A. No sir I did not open my head until today.

47 Q. You did not, did you say anything to either of them that you were holding possession adversely to Jobes. That you were holding any sort of possession for Martindale?

A. No I did not.

48 Q. I will ask you if the day that Jobes and Lambert were out there to take possession, they did not reach the ranch while you were yet in town?

A. I presume they were. They were there when I returned.

49 Q. Did you not receive telephone message from them that they were there?

A. No, not from them.

50 Q. From some one?

A. Oh yes.

51 Q. From whom did you receive the telephone message?

A. I don't know. I think it was some one from Fleming's barn.

52 Q. Did you not learn from that telephone message or from word of mouth from Tom Fleming that Jobes and Lambert's object was to take possession for Jobes?

A. No, sir.

53 Q. Previous to reaching the ranch and finding Jobes and Lam-

bert there did you have any idea what their trip was for, and if so state from whom you got your information, and what your information was?

A. If I did, I do not now remember.

54 Q. To refresh your recollection, did not Lambert in the presence of Jobes at Sunny Slope, on your arrival tell you that they were out to take possession or that in substance, and did not you then respond that you had learned that fact downtown?

A. I don't remember that I had learned that they was there to take possession.

55 Q. Did you notify Martindale in any way by any means that you had learned Jobes was about to take possession?

A. I did not.

56 Q. How soon after they were out there, if ever at all, did you tell Martindale that Jobes had taken possession?

A. On their taking possession I notified Mr. Martindale by telephone, right away.

57 Q. Well, they did take possession that day, did they?

A. Yes, sir.

58 Q. And about what time in the forenoon?

A. Why, it was about 7 o'clock in the morning. They took breakfast with us.

77 59 Q. You recognized that possession, did you?

A. Yes, I notified Mr. Martindale. If he wanted to make a fight he could.

60 Q. Martindale has never done anything to your knowledge to interfere with?

A. No sir. Not to my knowledge.

61 Q. Within a day or two or very shortly after the Cross funeral and before Jobes had taken formal possession, didn't you inquire of Jobes who would be paying the hands, putting up the necessary attending expenses?

A. I and Mrs. Cross had a talk about that and I also had a talk with Mr. Jobes.

62 Q. To that effect?

A. Yes, sir.

63 Q. Didn't you receive, commencing right away after Cross' funeral, pay for your work out there dated in payment from the day of Cross' death until the last day you were there in service from Jobes?

A. We received our pay the first day of every month.

64 Q. If you have ever believed in any lucid moment that you were holding possession for Bill Martindale, how is it that you took all your pay from Jobes and never reported to Jobes until he may have heard it from you upon the witness stand today, that Martindale had made claim upon that property?

A. Mr. Jobes had taken possession prior to the 1st of the month, and he paid the money the first of the coming month for the month of November.

By JOHN MADDEN:

65 Q. From the time Mr. Martindale told you he had a bill of sale and wanted you to continue on the farm as you had been doing, until you quit, did you ever consult Martindale as to the use of any money for feed or the paying of hands or any other expenditures on the farm, or as to any sales of cattle?

A. No, to the first question and yes to the last. I had credit here in town and never had a party refuse me credit during all this time.

66 Q. Then I understand you to say that you never consulted Martindale as to the use of any money for feed or the payment of hands or any other expenditure of Sunny Slope from the day Cross died until you quit?

A. I had no occasion to.

67 Q. Did you ever consult Martindale as to any sales of cattle before the sales were made from the time Cross died until you quit?

A. Yes, sir.

68 Q. What sales did you consult him about?

A. Well, I remember about those two calves and also about the big sale. That was in Decem ber.

78 69 Q. Did you not also consult Mrs. Cross and other parties about these two calves and also the big sale?

A. Before it got around I consulted all of them.

70 Q. The proceeds of the sale of the calves were turned over to you and by you turned over to C. S. Jobes?

A. Yes, sir.

71 Q. And what was done before Jobes took formal possession of Sunny Slope?

A. I don't remember.

72 Q. Did you consult Martindale about turning that money over to Jobes?

A. Why, I believe I did. I am not certain about that.

73 Q. Did you ever account to Martindale or turn over to him the proceeds of any sales or any moneys received by you on Sunny Slope farm from the time Cross died until you quit?

A. I did not.

74 Q. Did you ever make any report to Martindale about the running expenses of the farm, the amounts expended or the amounts received from the time Cross died until you quit?

A. Not any written report.

75 Q. Did you not account to C. S. Jobes receiver, or F. C. Newman for every sale, for every expenditure of money, and for everything done by you on the farm from the time Cross died until the day you quit?

A. I did.

76 Q. Didn't you call on C. S. Jobes, receiver, within a day or two after Cross' death and ask him what you should say to the men about their pay and when you should say to them that they would receive it?

A. Well, I talked to him about furnishing the money and about paying the men off. I don't just remember the words.

77 Q. Now, I will ask you Mr. Evans, why you did not go to Martindale for that?

A. This is previous to the time Mr. Martindale told me he had a bill of sale.

By Judge CUNNINGHAM:

1 Q. Now Evans, what sort of a performance was gone through with the time Mr. Lambert and Jobes went out to take possession?

A. They said they came to take possession.

2 Q. Thereupon and thereafter you considered yourself as holding possession for Mr. Jobes and that's what you spoke of as "their taking possession and being in possession?"

Objection by John Madden: We object to the question and answer for the reasons heretofore stated and for the additional reason that it is calling for a conclusion and an opinion from the witness and not a statement of fact.

Additional objection by John Madden: We make the additional objection that (—) is suggestive and leading.

A. Yes.

79 2 Q. Now, from the first to last you may state for whom you were in possession of that stock and stuff.

Objection by Mr. Lambert: We object to it for reasons heretofore urged and for the further reason that it is leading and suggestive, calling for a conclusion and not a statement of the facts.

A. C. S. Cross, William Martindale, and C. S. Jobes, receiver.

3 Q. Please state for what times you were in possession for these several parties.

A. From the 18th day of June until the 16th day of November for C. S. Cross, and for a few days there I do not know who was controlling matters, and then for Mr. Martindale and the balance of the time, Mr. Jobes.

4 Q. Your possession for Mr. Martindale terminated and the possession by Mr. Jobes commenced before the first of the month, which was the pay day as I understand.

Objection by Mr. Madden: Objected to for the reasons heretofore urged and for the additional reasons that it is leading, suggestive, calling for a conclusion of the witness and not a statement of fact.

A. Yes.

5 Q. Can you now state under what claim of right Mr. Jobes took possession?

Objection by Mr. Madden.

Objected to for the reasons heretofore urged and for the further reason that it calls for a conclusion and an opinion of the witness and not a statement of fact.

A. I think Mr. Jobes or Mr. Lambert made the statement that Sunny Slope was indebted to the bank.

6 Q. Mr. Jobes, then as a receiver, was taking possession of this property belonging to C. S. Cross?
A. Yes sir.

By Mr. MADDEN:

1 Q. There was not a day from the time C. S. Cross died until you quit, but that C. S. Jobes as receiver or F. C. Newman as administrator paid out money to you or on your voucher for the expenses of the farm?
A. There was no occasion for me to use money daily.
2 Q. Is it not a fact that C. S. Jobes paid your vouchers and paid you your salary as manager and postage for catalogues and money for the incidental expenses of the farm until he took possession on the 28th day of November?
80 A. I do not believe I drew on Mr. Jobes until the first of the month. I did not draw on him at all for postage stamps for catalogues.
3 Q. Is it not a fact that you received money from C. S. Jobes or that the same was paid out on your vouchers or O K by C. S. Jobes from the time Cross died until the 28th day of November when he took possession?
A. Not all of the time. I borrowed money from Mrs. Cross.
4 Q. I will ask you now the direct question, why you did not go to Martindale instead of borrowing money from Mrs. Cross?
A. Mr. Martindale had not taken possession at this time. (*A.*) Martindale had not declared his intention yet of taking possession.
5 Q. What time was it with reference to the day of the death of C. S. Cross when you borrowed this money from Mrs. Cross?
A. After the death of Cross.
6 Q. Now I want the time.
A. I haven't got it.
7 Q. State approximately how many days or weeks after the death of C. S. Cross?
A. Within ten days.
8 Q. Is that the nearest you can put it?
A. Oh that is as near as I care to put it.
9 Q. Is that your best judgment?
—. ——.
10 Q. For what purpose did you require that money?
A. For use on the farm.
11 Q. What particular use on the farm?
A. To pay off hired men.
12 Q. Did you not, a few moments ago, swear that the men were not to be paid off until the first of the month and that that was the reason that you did not go to Mr. Martindale for money?
A. No.
13 Q. Now Mr. Evans, I want to ask you a direct question. Did you get any money to meet any expenses on the farm from C. S. Jobes from the day that Cross died until the day that he took possession of the farm?
A. I could not state. I do not remember.

14 Q. Will you now swear that you did not receive it?

A. I will neither swear that I did nor I didn't.

15 Q. Now, if you did receive money in that interval of time, that mentioned in the previous question, why didn't you go to Martindale to get it instead of C. S. Jobes?

A. If I now knew that I did I could tell you why I did not go to Mr. Martindale.

16 Q. You may now state why?

A. (*You may now state why.*)

(*17 Q.*). I do not know why. I do not know that I got the money from Mr. Jobes.

81 18 Q. Now I will ask you the question Mr. Evans, did you ever tell anybody that you ever took possession of Sunny Slope farm or held possession for William Martindale from the day that Cross died until after C. S. Jobes took possession?

A. I did not until today.

By Judge CUNNINGHAM:

1 Q. Did you ever tell any one that you took possession or held possession of Sunny Slope farm for C. S. Jobes?

A. I did not until today.

2 Q. Was there any one present at the time that Mr. Martindale directed you to take possession of Sunny Slope farm for him under his bill of sale?

A. There was.

3 Q. State who?

A. Jim Johnson of Hamilton, Kansas.

4 Q. How frequently through July, August, September and October was C. S. Cross at the Sunny Slope farm?

A. Often.

5 Q. Can't you state about how often?

A. No sir.

6 Q. As much as once a day or once in two days?

A. Oh he would average at least twice a week.

By Mr. MADDEN:

1 Q. You stated in answer to a question of Judge Cunningham that you did not tell anybody that you had taken possession for C. S. Jobes receiver. I will ask you now if you did not call up all of the men on the farm and tell them that they were now working for C. S. Jobes receiver and he was the man who would furnish the money to pay them off?

A. I think so, now since I remember.

2 Q. Now did you say anything to any of the men that you took possession for Martindale and that Martindale would furnish the money to pay them?

A. I did not.

By Judge BUCK:

1 Q. I will ask you, Mr. Evans, if one Mr. L. Blum who claims to reside in the city of Mexico, did not about January 9, 1899, bring

suit against you in your individial capacity and also against you as manager of the Sunny Slope ranche and Jobes as receiver and Newman as administrator upon the ground that you had in some way gone back upon an agreement that you had made with him through telegrams passing backward and forth between him and yourself about date December 26 and 27, 1898, which suit is now pending in the district court of Lyon county, Kansas?

A. Yes sir.

2 Q. Is it not true that you appeared by attorneys in that case and have filed pleadings there?

A. Why, yes sir, I understand so.

3 Q. In that suit have you by any pleadings ever intimated in that court that in the handling of the twenty head of cows in
82 issue in that suit and being part of the stock on the Sunny Slope farm that your possession was in any sense the possessisn of William Martindale or that William Martindale had any interest, direct, indirect or remote, in that stock or any of it?

Objection by Judge Cunningham.

Objection is made that it is incompetent, irrelevant and immaterial and the witness has no knowledge of the same.

A. I never saw the pleadings, I do not know what (*it*) contained.

4 Q. Did you at or before the filing of the pleadings by your attorneys in your behalf inform them that Mr. Martindale had any interest in that property?

A. I have never informed any one, Judge, from beginning to end until today.

Testimony of Thos. Evans.

By Mr. LAMBERT:

1 Q. Mr. Cross died on Nov. 16th, 1898, did he not?

A. Yes.

2 Q. I will ask you if it is not a fact that Mr. Jobes came out to Sunny Slope and took formal possession of the personal property on that place on the morning of the 28th day of Nov. 1898?

A. On or about that time, I don't remember the exact date.

3 Q. Assuming it was about that time, I will ask you if you did not, about the time of the Cross funeral or a few days thereafter talk with Mr. Shuman, you know who he is don't you, out at the farm, and if he did not ask you who would pay the bills out there, and if you did not say to him Mr. Jobes would pay all bills, that you had seen him, and he would pay all bills from the time of Cross' death?

A. I don't remember.

4 Q. Will you now swear that you did not say to this man Shuman only a few days before or after the Cross funeral, and at least several days before the Monday morning that Jobes came out and took possession, that you had seen Jobes and Jobes was to pay all bills at the farm from the time of Cross' death?

A. I will not.

5 Q. I will ask you, if you did not get money from Mrs. Cross

between the time of Cross' death and the time Mr. Jobes came out there for the purpose of taking possession and when you got the money of her, it was understood between you that Jobes would pay all bills and it was so stated by both of you, that it was to come out of the funds of Sunny Slope farm?

A. No.

6 Q. I will ask you, if you have looked at your checks, since you was a witness on Saturday, I mean the check you testified about on Saturday?

A. I looked at the stubs. Yes.

83 7 Q. You may state what the date of that stub was?

A. 25th day of Nov. '98.

8 Q. You know that is correct?

A. Yes.

9 Q. Do you now wish to correct your testimony, when you swore you thought the selling of the two calves and the paying of $500.00 to Mr. Jobes was after the 28th, that is to say, after the time Mr. Jobes took formal possession of the cattle?

A. I think not.

10 Q. Don't you know that the check you gave in payment of those two calves was cashed at the Citizens' bank?

A. Yes, of course it was. I cashed it myself.

11 Q. Don't you know it was cashed on the 25th day of Nov.?

A. Yes I drew the money myself.

12 Q. Don't you know you paid that money in to Mr. Jobes on the day you drew the cash on that check?

A. I don't know the exact date.

13 Q. Don't you know it was on that same day?

A. I don't remember exactly, whether it was on that day or not.

14 Q. You had sold the calves then prior to that time?

A. Yes.

15 Q. And paid for them on the 25th?

A. Yes, sir.

16 Q. Now, if it turns out that Mr. Jobes did not come out and take formal possession of this stock on the morning of the 28th of Nov. you made the sale, while you say you were holding possession for Mr. Martindale of the two calves?

A. Yes, sir.

17 Q. Is it not a fact you received pay from Mr. Jobes for all work you did at the farm from the day of the death of Mr. Cross until the farm was sold?

A. Yes.

18 Q. Is it not a fact that Mr. Jobes paid all your vouchers from the day of Mr. Cross' death, until you quit?

A. Yes, sir.

19 Q. Mr. Martindale never paid out anything, did he?

A. No, he never did.

20 Q. Certain of that?

A. He asked me about my credit and I told him it was good here in town to pay the bills and such things as that.

21 Q. You did not tell him you did not need any credit here in Emporia, that Mr. Jobes would pay all the bills?

A. I did not.

22 Q. The delivery of these calves was made on the day before they were paid for?

A. I think we delivered them on Saturday, I think the 22nd, and I paid the money to Mr. Jobes about Monday. I am not certain about the dates, but it was somewhere about that time.

84 23 Q. Going back to dates, the cattle were delivered either on the 24th or morning of the 25th, regardless of the day of the week that comes on?

A. Yes, sir.

24 Q. Now, before the delivery of these cattle, you consulted with Mr. Jobes about it?

A. I think so, and with Mr. Martindale and Mrs. Cross. I had to have an understanding in regard to making transfers.

25 Q. And in order to get that, you consulted with Mr. Martindale and Mrs. Cross, and did as they directed you?

A. I don't remember.

26 Q. They were harmonious with you?

A. They were harmonious.

27 Q. Of course you discussed who was to receive the proceeds?

A. That was understood.

28 Q. And they agreed that the $500.00 should be turned over to Mr. Jobes?

A. Yes, sir.

Redirect examination:

1 Q. Did you know whether or not, at this time, negotiations relative to the settlement of the question of the right of possession of this property by an amicable arrangement was under consideration?

A. That was my understanding.

Recross-examination:

1 Q. Who did you get that understanding from?

A. I seem to have gotten it from several parties.

2 Q. Did you not know there was some contest as to who should be administrator and that nothing was settled or to be settled, until an administrator was appointed?

A. I don't know as to that.

3 Q. Don't you know you were urging the appointment of Mrs. Cross?

A. No.

4 Q. Didn't you know that Mrs. Cross wanted to be appointed administrator?

A. No.

5 Q. You stated to Judge Cunningham you understood negotiations were pending for the settlement of the right of possession of this stock at the time you delivered this money to Mr. Jobes was

that your understanding? Who did you get that understanding from?

A. I don't remember.

6 Q. You remember that you had an understanding that Mr. Jobes was to be the custodian of all funds that was to be received at the farm and that is the reason you paid the $500 to him?

A. I cannot say.

7 Q. Why did you pay it to him?

A. Mrs. Cross and Mr. Martindale instructed me.

Redirect ex.:

1 Q. As you understood it at the time, it seems there was an arrangement talked of and about to be consummated whereby
85 the question of the cattle was to be settled without a lawsuit and the funds held by Mr. Jobes?

A. That is the reason why I paid the money to Mr. Jobes.

Recross-examination:

1 Q. You told Judge Cunningham that you understood from all parties there there was to be an agreement all around and for that reason you paid the funds to Mr. Jobes. State whether you can tell the names of the parties or any one with whom you had consulted with about the subject-matter?

A. No.

2 Q. I ask you this question as to whether you can tell where you got this information from and state the name of the parties?

A. I could not name them.

3 Q. Can't you remember any of them?

A. No I could not tell. I only know I paid the money to Mr. Jobes.

4 Q. Why did you turn this money over to Mr. Jobes?

A. Mr. Martindale and Mrs. Cross instructed me to turn the money over to Mr. Jobes?

THOMAS EVANS.

STATE OF KANSAS, }
Lyon County. }

In the District Court Thereof.

H. L. LEIBFRIED, Plaintiff, }
vs.
C. S. CROSS, Defendant. }

Whereas, on the 29th day of June 1898 on the hearing of the application made by said plaintiff for a temporary injunction in the above-entitled cause before Hon. W. A. Randolph, judge of the district court at his chambers, it was ordered that, unless the defendant, C. S. Cross, within forty-eight hours would give a bond to the plaintiff, to be approved by the said judge, to pay any final judgment that said plaintiff might recover in said cause.

Now therefore, we the undersigned C. S. Cross, as principal and

Wm. Martindale, H. C. Whitley as sureties, do hereby undertake to the said defendant and promise and agree in consideration of said temporary injunction not being granted, that we will promptly pay any final judgment recovered by plaintiff against said defendant in said action, said C. S. Cross reserving the right before payment of any judgment that may be rendered against him of having the same reviewed in manner provided by law, by the proper reviewing court.

Witness our hands this July 1st 1898.

C. S. CROSS.
WM. MARTINDALE.
H. C. WHITLEY.

Approved by me this July 1st, 1898.

W. A. RANDOLPH, *Judge.*

Indorsed on the back thereof was the following: No. 9506. No. 496. H. L. Leibfried *vs.* C. S. Cross. Bond. Filed July 1st, 1898. S. F. Bucher, clerk. Exhibit 6th.

86 H. C. WHITLEY, produced as a witness by the complainant, The Fourth National Bank of St. Louis, and the cross-complainants, The First National Bank of New York and Ford Harvey, being duly sworn, deposes and says:

1 Q. State your name, age and place of residence?

A. H. C. Whitley, Emporia, Lyon county, Kansas, age sixty-four.

2 Q. I exhibit to you a bond given by Cross to H. L. Lebifried, plaintiff *vs.* Cross, defendant in action number 9506 in the district court of Lyon county, Kansas, purporting to be signed by C. S. Cross, William Martindale and H. C. Whitley and ask you to state whether or not the signature purporting to be yours is your genuine signature?

A. Yes sir, that is my signature. I signed it.

3 Q. You may state under what conditions and circumstances you signed that bond?

A. I signed the bond at the request of William Martindale.

4 Q. After the signing of the bond was there any other or farther circumstances connected with the giving of any security to secure you therefor? If so state fully.

A. There was no security or anything at all. I afterwards spoke to Mr. Martindale about it and asked him if it was all right.

5 Q. Did he say anything to you about the giving of security to secure you as a bondsman on that bond at any time afterwards?

Judge BUCK: We object to that because the bond is the best evidence of every condition connected with its execution and because it would be incorporating a hearsay.

A. Well I was told afterwards that there was a bill of sale given.

6 Q. For what purpose?

A. To secure me in signing the bond.

Cross-examination.

By Mr. LAMBERT:

7 Q. You are a friend of Mr. Martindale's?

A. Yes sir.

8 Q. And have been in consultation with him about this matter?

A. Well we consulted several times.

9 Q. Colonel, I am going to ask you this question, If you will swear that you ever heard anything about this bill of sale which Judge Cunningham inquired about until after the death of C. S. Cross?

A. I never did.

10 Q. And you never did see the bill of sale until after his death?

A. I never saw it until after his death.

11 Q. Then of course you never took into consideration a bill of sale when you signed this bond because you did not know that it was in existence?

A. No I did not know of it.

87 12 Q. And there was no promise made that there should be such a bill of sale executed?

A. No sir.

H. C. WHITLEY.

The complainant, The Fourth Nat. Bank of St. Louis and the cross-complainant, The First National Bank of New (—), and Ford Harvey, produce as a witness F. C. NEWMAN, who being first duly sworn, deposeth and saith:

1 Q. State your name, age and residence?

A. F. C. Newman, forty-four, Emporia, Kansas.

2 Q. State if you are the F. C. Newman mentioned as a witness of the defendants in this action, as the administrator of the estate of C. S. Cross deceased.

A. I am.

3 Q. I hand you the original of an agreement entered into by and between C. S. Jobes, receiver of the First National Bank of Emporia, Kansas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, L. B. Kellogg and Chas. B. Graves, att'ys for William Martindale, E. W. Cunningham, att'y for H. C. Whitley, which was made as the parties now agree upon Nov. 29th, 1898 in the interest of the parties named and other parties, claiming to have certain rights in the cattle and other personal property belonging to C. S. Cross in his lifetime, and ask you whether or not the same is correctly copied in the bill of complaint exhibited to you?

A. I am not informed as to what the pretended copy attached to the bill of complaint is, but I now hand to the commissioner a correct copy of the original agreement and ask him to attach the same to my deposition as a part thereof and marked "Ex. 7."

4 Q. Under this agreement, Mr. Newman, do you know what became of the property therein spoken of? If so, state fully.

A. A part of the cattle was sold in Kansas City at public sale on

Dec. 7th, 1898 and the rest of the cattle and personal property was sold on Dec. 23rd, 1898 to C. A. Stannard.

5 Q. Altogether was all of the property belonging to C. S. Cross on the Sunny Slope farm, being all of his live stock, cattle, hogs and horses and other personal property there sold? All disposed of?

A. It was, except exemptions claimed and allowed to Mrs. C. S. Cross.

6 Q. Please state the net proceeds of these sales?

A. The net proceeds in cash amounted to $34,209.39, the same being deposited in the Emporia national bank and in notes to $18,750, making a total of $52958.39. These notes are made by C. A. Stannard and are payable as follows:

One note, dated Dec. 28th, 1898 for $6,250.00 payable to C. S. Jobes, receiver of the First Nat. Bank of Emporia, Kansas,
88 and F. C. Newman, administrator of the estate of C. S. Cross, deceased, due on or before Dec. 28th, 1899; another note same date for $9,375.00 to same parties, payable on or before Dec. 28th, 1900; one note, same date for $3,125.00 in favor of the same parties, payable on or before June 28th, 1900.

All of said notes are signed by C. A. Stannard and secured by chattel mortgage on the personal property purchased and a second mortgage on 600 acres of land purchased of the estate of H. C. Cross.

7 Q. Does this amount of cash on deposit in the bank include $500.00 the proceeds of two calves sold by Thomas Evans after the death of Mr. C. S. Cross?

A. I don't know.

8 Q. Have you any knowledge where this $500.00 now is?

A. I have not.

F. C. NEWMAN.

NOVEMBER 29TH, 1898.

Whereas, C. S. Jobes, receiver of the First National Bank of Emporia, Kansas, has taken possession of and claims the cattle and other personal property at Sunny Slope farm near Emporia, to be the property of said bank, and as such assets of said bank in his hands as such receiver, and

Whereas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, claims said cattle and other personal property on said farm, to be the property of said estate and as such assets of said estate, and

Whereas, Ford Harvey, H. C. Whitley, Wm. Martindale, and other parties claim to have certain rights in said cattle and other personal property by virtue of bill of sale thereof, made by said C. S. Cross to Wm. Martindale, and

Whereas, all parties in interest are satisfied that it is to the benefit of all to have the public sale of a portion of said cattle at Kansas City, heretofore planned by said C. S. Cross go on and take place on Dec. 7th, 1898 as advertised. It is now stipulated and agreed that said C. S. Jobes, receiver as aforesaid, shall make said sale and as soon as possible sell the balance of said cattle and other personal

property upon said farm for as much money as it is possible for him to obtain for the same, and out of the proceeds of said sale deduct all actual and necessary expenses incurred heretofore and which may be necessary in making said sale, and expenses in feeding and caring for said cattle and other personal property until sold. That he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia national bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator, said net proceeds to be treated by all persons interested the same
89 as though the cattle and other personal property were the subject-matter of litigation said funds to remain in said bank until a final decision is reached in the courts as to who the said funds belong to. It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle shall be prejudiced in any manner but that all of said rights shall (attached) to and be vested in the said net proceeds derived from the sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property, and the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto nor prevent the assertion of their rights to the net proceeds derived from the sale of said cattle and other personal property in any manner, in any court that they desire to assert their rights or could have asserted said rights to said cattle and other personal property, had they not been sold by said C. S. Jobes. It is hereby agreed in order that said cattle and other personal property may bring as much as possible and in order that there may not be any question raised as to title by purchaser, that said F. C. Newman as administrator, shall join with the said Jobes and help sell said cattle and other personal property.

C. S. JOBES,
Receiver First National Bank of Emporia, Kansas.
F. C. NEWMAN,
Administrator of Estate of C. S. Cross, Dec'd.
L. B. KELLOGG AND
CHAS. B. GRAVES,
Att'ys for Wm. Martindale.
E. W. CUNNINGHAM,
Att'y for H. C. Whitley.
WM. C. HOOK,
Att'y for Ford Harvey.

Exhibit 7th. W. N. S.

H. P. CLARK is produced as a witness on behalf of the complainant, The Fourth National Bank of St. Louis, and the cross-complainant, The First National Bank of New York, and being duly sworn, on his oath deposes and says:

1 Q. You may state your name, age, residence and occupation?
A. H. P. Clark, age 40, residence Emporia, Kansas, occupation book-keeper.

2 Q. State whether or not in your capacity as an expert bookkeeper you have examined the books and papers of the First National Bank of Emporia, Kansas?

A. I have.

90 3 Q. On November 16th, 1898, the Fourth National Bank of St. Louis held a note, a copy of which is set out in this petition, and marked Exhibit "A," and also a note, a copy of which is set out in its complaint and marked Exhibit "B," you may now tell by looking at these copies and from the knowledge you have derived from an examination of the books and papers of the First National Bank of Emporia, Kansas, what these notes are renewals of?

A. These two notes, copies of which are attached to the bill of complaint, are renewals of two notes of the same amount, signed by the same parties which matured November 14th 1898.

4 Q. Do they both follow the same history?

A. Yes.

5 Q. These two notes matured November 14th, 1898, were discounted to the Fourth National Bank of St. Louis on October 13th, 1898?

Mr. LAMBERT: When?

WITNESS answering: October 13th, 1898.

6 Q. Can you tell the date of them?

A. The date of the notes?

7 Q. Yes.

A. The notes are 30-day notes, and the date would be 33 days counting back from November 14th.

8 Q. That would be the 12th of October?

A. These two notes were dated October 12th, discounted on October 12th the proceeds of the discount amounting to $19871.66 which amount was credited to the First National Bank of Emporia by the Fourth National Bank of St. Louis for the use of Martindale and Cross, and the same date the Fourth National Bank of St. Louis charged up to the account of the First National Bank of Emporia with them a note for $10,000.00 dated September 19th, 1898, due October 12th 1898, payable to the order of Martindale and Cross, signed S. Nation and endorsed Martindale and Cross, C. S. Cross and William Martindale, also a note for $6786.45, dated September 19th, 1898, due October 12th, 1898, signed S. Nation and made payable to Martindale and Cross and endorsed as the other one was, a note for $10,000.00 dated September 19th, 1898, due October 12th, 1898, signed W. J. Ryan, payable to the order of Martindale and Cross, endorsed Martindale and Cross, C. S. Cross, William Martindale, the total charge being $26,786.45.

9 Q. Can you go back further than that?

A. Yes.

10 Q. Well, go back another hitch. The next hitch will take it back to November 16th, 1897, due September 19th, 1898.

A. No this Nation note that I have just read as being charged up in the $20,000.00 was the note dated November 16th, 1897.

91 The notes just described which was charged up on October 13th were renewals of the following notes: a note for

$10,000.00 dated November 16th, 1897, due September 19th, 1898 payable to the order of Martindale and Cross, signed S. Nation, and a note dated November 16th, 1897, for $6786.45 payable to the order of Martindale and Cross, due September 19th, 1898, signed S. Nation, both notes endorsed Martindale and Cross, C. S. Cross and W. Martindale; these two notes being due September 19th, and were on that date renewed 30 days and then on October 13th charged up as before described. The other note that was charged up on October 13th, 1898, was a note dated December 20th, 1897, for $10,000.00, due September 20th, 1898, payable to the order of Martindale and Cross, signed W. J. Ryan and endorsed Martindale and Cross, W. Martindale and C. S. Cross. This note was renewed and finally charged up on October 13th, 1898.

11 Q. Then the notes, copies of which are set out in the complainant's bill of complaint and marked Exhibits A and B are in part renewals of an indebtedness held by the Fourth National Bank of St. Louis on and before the 15th day of July, 1898, are they?

A. They are.

12 Q. All of which indebtedness existed at the time named, to wit: on or before July 15th, 1898, was endorsed by Martindale and Cross, William Martindale and C. S. Cross?

A. They were.

13 Q. Now, referring to the note set out by the cross-complainant, The First National Bank of New York, and marked Exhibit A, you may give the history of the same?

A. You want that traced back to the original of the indebtedness?

14 Q. Well back to that 15th day of July?

A. The $30,000.00 now held by the First National Bank of New York is a renewal of a note of the same amount made May 2nd, 1898, for five months; the note is for $30,000.00 payable to the First National Bank of New York, signed Martindale and Cross, C. S. Cross and William Martindale. The proceeds of this note $29230.00 were credited to the First National Bank of Emporia, Kansas, by the First National Bank of New York on May 2nd and other indebtedness of Martindale and Cross charged that same date.

Q. 15. Connected with this last-mentioned note did the First National Bank of New York hold any other notes, and if so state by whom they were made and the dates and amounts?

A. The First National Bank of New York held in addition (—) the $30,000 note described a note signed C. V. Eskridge and Company, dated October 24th, 1898, payable to Martindale and
92 Cross, due January 1st, 1899, amount of $10,000.00, a note dated October 22nd, 1898, signed by S. Nation for $10,000.00 payable to the order of Martindale and Cross, due January 1st, 1899, and a note of H. L. Leibfried, dated December 24th, 1897, due October 24th, 1898, favor of Martindale and Cross for $10,000.00. All of these notes were indorsed Pay to the order of the First National Bank of New York, Martindale and Cross, C. S. Cross, W. Martindale and the further endorsement, Demand, protest and notice of protest waived, Martindale and Cross, C. S. Cross, W. Martindale.

The two notes held by the Fourth National Bank of St. Louis for $10,000.00 each were endorsed Pay to the order of the Fourth National Bank of St. Louis, Missouri, Martindale and Cross, C. S. Cross, W. Martindale, and were also endorsed, Demand, protest and notice of protest waived, Martindale and Cross, C. S. Cross, W. Martindale.

$10,000.00. EMPORIA, KANSAS, *Dec. 24th*, 1897.

Ten months, no grace, after date, I promise to pay to the order of Martindale and Cross ten thousand dollars at First National Bank of New York, with interest at the rate of 10 per cent. per annum from date until paid, value received.

36645 H. L. LEIBFRIED.

Ex. 10. W. N. S.

Indorsed on back: Pay to the order of First national bank, New Yor'.

Indorsed on back: Pay to the order of First national bank, New York. Martindale & Cross, C. S. Cross, W. Martindale. Protest and notice of demand and protest waived. Martindale & Cross, C. S. Cross, W. Martindale.

$10,000. EMPORIA, KANSAS, *Nov.* 14", 1898.

Dec. 15, 1898, — days after *after* date, I promise to pay to the order of Martindale & Cross ten thousand dollars at Fourth nat. bank, St. Louis, Mo., with interest at the rate of 6 per cent. per annum from due until paid. Value received.

S. NATION.

Due ——, 189–.
No. 36674 P. O. ——.
($2.00 rev. stamps)
Ex. 9. W. N. S.

Indorsed on back: Pay to the order of Fourth Nat. Bank of St. Louis, Mo., Martindale & Cross, C. S. Cross, W. Martindale.
Demand protest & notice of protest waived. Martindale & Cross, C. S. Cross, W. Martindale.

16 Q. Can you state whether the $30,000.00 note held by the First National Bank of New York was the principal note and the three others the collateral, or whether the three were the principal notes and the $30,000.00 the collateral?

93 A. The $30,000.00 note was the principal note.

17 Q. How are you able to determine this and what facts are shown by the books that make you conclude this to be so?

A. On the 4th of October, 1898, the First National Bank of New York credited the First National Bank of Emporia with the proceeds of a loan, $29,700.00 and on the same day made the following charge loan M. and C. $30,000.00. In making the credit for the new discount the First National Bank of New York deducted six per cent. interest for 60 days from the Martindale and Cross note. The other notes, the $10,000.00 notes, are dated after that date, two

of them, the Eskridge note being dated October 24th, 1898, the Nation note dated October 22nd, 1898, and the Liebfried note October 24th, 1897, so that these notes could not have been discounted on October 24th, 1898.

18 Q. Then so far as the First National Bank of New York is concerned the evidence in your possession shows that it viewed the $30,000.00 note of Martindale and Cross as the principal, whatever may have been the facts at this end of the line. That is so, is it not?

A. Yes.

Upon cross-examination by Mr. Lambert the witness testified as follows:

1 Q. The $30,000.00 note, payable to the First National Bank of New York, dated October 3, 1898, signed Martindale and Cross individually C. S. Cross and W. Martindale, I mean now the note that was shown you as the basis for the cross-complaint of the First National Bank of New York, it was your understanding from the books that this was a renewal of a note for the same amount, signed by the same parties, payable to the same parties, discounted at the First National Bank of New York upon the 2nd day of May, 1898. Is that correct?

A. Yes.

$30.000 EMPORIA, KANSAS, *October 3rd*, 1898.

Sixty days after date we promise to pay to the order of First national bank, New York, thirty thousand dollars at First national bank, New York, with interest at the rate of 6 per cent. per annum from date until paid. Value received.

36642 MARTINDALE & CROSS.
C. S. CROSS.
W. MARTINDALE.

Ex. 7" W. N. S.

Indorsed on back: $6.00 in rev. stamps.

2 Q. I believe you stated that when this note last mentioned was discounted by the First National Bank of New York the
94 proceeds derived from said discount was credited to the First National Bank of Emporia. Is that correct?

A. It is.

3 Q. Now, I will ask you if upon the same day that the proceeds of this discount was placed to the credit of the First National Bank of Emporia by the First National Bank of New York, if there wasn't an indebtedness of Martindale and Cross charged up to the First National Bank of Emporia, Kansas, by the First National Bank of New York?

A. There was.

4 Q. Then the books show that the firm of Martindale and Cross got the benefit of the original discount made May 2nd, 1898, which was the basis for the note dated October 3rd, 1898? Is that correct?

Judge CUNNINGHAM: That is objected to because it is calling for a conclusion of the witness and not a fact.

A. On May 2nd, 1898, the proceeds of the $30,000.00 of which the note sued upon is a renewal were credited Martindale and Cross and a loan of $35,717.50 were charged up.

5 Q. Then as a mat-er of fact at the time the Martindale and Cross note of May 2nd was credited to the First National Bank of Emporia, the First National Bank of New York charged an amount to the First National Bank of Emporia and the indebtedness of Martindale and Cross largely in excess of the discount named was made a first basis that the First National Bank of New York founds their claim in this action on? Is that a fact?

A. It is.

6 Q. You may state if you can in detail the origin of the Martindale and Cross indebtedness that was charged up by the First National Bank of New York to the First National Bank of Emporia on the 2nd day of May, 1898, referred to by you as the thirty-five thousand and some odd dollars note?

A. The $35,000.00 loan charged up May 2nd, 1898, was a loan made by the First National Bank of New York, December 27th, 1897.

7 Q. Whose note was that?

A. The note was discounted for Martindale and Cross.

8 Q. How was it signed?

A. I don't know I haven't the note.

By Judge CUNNINGHAM:

1 Q. To whose credit did the proceeds of that note go?

A. To the credit of C. S. Cross. The $35,000.00 that was credited C. S. Cross December 27th, 1897, made good his account out of which he paid a Martindale and Cross note given to the First National Bank of New York March 2nd, 1897, for $30,000, signed Mar-
95 tindale and Cross. The proceeds of this note dated March 2nd, 1897, paid the loan of Martindale and Cross or a note for $10,000.00 dated March 31st, 1896, payable to the First National Bank of New York, signed by Martindale and Cross, C. S. Cross and William Martindale, which had been charged up to the account of the First National Bank of Emporia by the First National Bank of New York on October 1st, 1896; and $10,000.00 of the note made March 2nd, 1897, covers the issuing of a draft for $10,000.00 a draft drawn by the First National Bank of Emporia on the First National Bank of New York dated September 28th, 1896, payable to the order of F. P. Salmon which was used to pay a note made by C. V. Eskridge for $10,000.00 that had been discounted at the State Bank of Chatham, New York.

9 Q. Right in that connection state the endorsements of the Eskridge note.

A. Martindale and Cross.

10 Q. And any other endorsements?

A. I don't know. I have accounted for $20,000.00 of the

$30,000.00 note; the remaining $10,000.00 is credited to the account of C. S. Cross. While the note was made originally for $30,000.00 on March 2nd, $5,000.00 was endorsed on March 5th by the First National Bank of New York, leaving the amount of the note $25,000.00.

11 Q. How was that $5,000.00 paid?

A. On April 30th, 1897, the First National Bank of New York was credited on the books of the First National Bank of Emporia with $5,000.00 to cover the $5,000.00 endorsement on the $30,000.00 note March 5th, 1897. The making of this credit to the First National Bank of New York was covered by a cash item of $5,000.00 which was carried for some time and finally charged to the account of Martindale and Cross on the books of the First National Bank of Emporia.

12 Q. The $35,000.00 note that was discounted in December, 1897, and credited to the account of Charlie Cross, as I understand it, made Charlie Cross' overdraft, then held at the First National Bank of Emporia good or nearly so. Is that correct?

A. He got the credit before all of the indebtedness was charged, it having been carried for some time in the New York account.

13 Q. The discount derived from the discounting of the $35,000.00 note in New York, signed Cross and Martindale, dated December, 1897, was used by C. S. Cross in the payment, as I understand it, of the $10,000.00 note held in Chatham, N. Y., signed C. V. Eskridge and indorsed Martindale and Cross and another $10,000.00 note signed Martindale and Cross, dated March 31st, 1896, and a draft of $10,000.00 that had been issued by the First National
96 Bank of Emporia and not paid for at the time it was issued and the $5,000.00 item that you explained heretofore. Is that correct?

A. No, the $35,000.00 loan made in December, 1897, paid the $30,000.00 loan made March 2nd, 1897, and that loan paid a loan of $10,000.00 of Martindale and Cross charged up in New York October 1st, 1896, and the issuing of a $10,000.00 draft used to pay a note of C. V. Eskridge at the State Bank of Chatham, New York, the remaining $10,000.00 being credited to the account of C. S. Cross.

14 Q. And what was done with the $10,000 item that was credited to the account of C. S. Cross?

A. I don't know, that was used by him.

15 Q. Now then take the draft that was issued before this to pay this Chatham note, that was a draft that was made payable to this man Salmon?

A. Salmon was cashier of the State Bank of Chatham.

16 Q. Then the $10,000.00 that was used for the purpose of paying the Chatham note was derived from the First National Bank issuing a $10,000.00 draft. Is that correct?

A. Yes sir, that is correct.

17 Q. Now then when this $30,000.00 note was given on March 2nd, 1897, do you know of any indebtedness that was joint that C. S. Cross had paid? What I mean by joint indebtedness, I mean indebtedness of Martindale and Cross.

A. None that I know of other than matters already explained.

18 Q. Now, then, take the note that was payable in Chatham, New York, which was paid by the draft March, 1896, do you know what that note was a renewal of?

A. The Eskridge note that was paid by that draft was discounted in November, 1895. In September or October, 1895, an Eskridge note held by the State Bank in Chatham came due and was remitted for by the First National Bank of Emporia, the amount of the draft, $10,000.00 being charged to the State Bank of Chatham, that is the draft was not paid for, it was charged to the State Bank of Chatham; the original charge that of the Eskridge note that was paid by the remittance in September or October, 1895, traces back to July, 1892.

19 Q. All this time was it indorsed Martindale and Cross?

A. It was in the original; how long it was I don't know.

20 Q. Then the note you referred to that was paid at the bank at Chatham was paid by the draft of the First National Bank of Emporia without any consideration, and the only thing that the First National Bank of Emporia had to show for the draft it issued was a false entry made in the bank books?

A. Yes, that is all the bank had.

97 21 Q. Afterwards it was made good by Martindale and Cross?

A. It was afterwards made good out of the proceeds of the $30,000 loan of Martindale and Cross made in New York March 2nd, 1897.

22 Q. Now then the $10,000.00 note that was charged up after the credit was given for the $30,000.00 discount described by you as the Martindale and Cross note charged up to the First National Bank of Emporia by the First National Bank of New York, you may state what was the origin of the indebtedness, if you know. If you don't know the origin of it, give it as nearly as you can.

A. I can't state what the origin of this indebtedness was.

23 Q. As far as you have been able to run this indebtedness of $30,000.00 back at its beginning you found that the indebtedness was Cross and Martindale's back as far as March 2nd, 1897. Is that correct?

A It is.

24 Q. Then you find that $20,000.00 of the indebtedness is Cross and Martindale's dated as far back as October 1st, 1896. Isn't that correct?

A. Only $10,000.00 of the $20,000.00 traces back to the indebtedness of Martindale and Cross to the First National Bank of New York, and $10,000.00 to an Eskridge note endorsed by them and paid in September, 1896.

25 Q. I will ask you to state now if the Nation and Eskridge notes for $10,000.00 each, shown you as the notes upon which suit is brought by the Fourth National Bank of St. Louis are not renewal notes for the same amount, signed by the same parties, dated October 12th, 1898?

A. They are.

26 Q. When these two notes were discounted by the Fourth Na-

tional Bank of St. Louis, October 12th, 1898, the proceeds of that discount was credited to the First National Bank of Emporia, was it not for Martindale and Cross?

A. It was for the use of Martindale and Cross.

27 Q. Now I ask you if on September 19th, if the following notes were not charged up to Martindale and Cross by the First National Bank of Emporia. Is that right?

A. No.

28 Q. Well, then the First National Bank of Emporia got no credit for the discount of these two notes on their own books?

A. No.

29 Q. You may state now when the Fourth National Bank of St. Louis discounted the two notes that I have mentioned, namely, the Eskridge and Nation notes, October 13th, 1898, if they didn't charge up individually afterwards the following notes for the same time; S. Nation, endorsed Martindale and Cross, C. S. Cross and William Martindale, also a note of $6700.00 signed S. Nation, endorsed Martindale and Cross, endorsed William Martindale and C. S.

98 Cross, also a note dated September 19th, due October 12th, 1898, signed W. J. Ryan, endorsed Martindale and Cross, endorsed William Martindale, C. S. Cross, $10,000. Is that correct.

A. That's correct.

30 Q. Isn't it a fact that the note due October 12th, 1898, signed W. J. Ryan, endorsed Martindale and Cross, William Martindale and C. S. Cross, which was charged by the Fourth National Bank of St. Louis against the discount made by the discounting of the Eskridge and Nation notes by the Fourth National Bank of St. Louis was given as a renewal note for the note of W. J. Ryan for $10,000.00 dated December 20th, 1897, and due September 20th, 1898, payable to Martindale and Cross, endorsed Martindale and Cross, endorsed William Martindale and C. S. Cross?

A. Yes, that's a fact.

31 Q. I will ask you now if you have any statement as to who was the actual party that owed that $10,000.00 note.

A. I have.

32 Q. Please produce it.

Witness produces paper which was read by Mr. Lambert and was as follows:

First national bank, Emporia, Kansas. Capital, $100,000.00; surplus, $100,000.00.

EMPORIA, KANSAS, 3/21/97.

C. S. Cross, Esq.

The two notes of $10,000.00 made by W. J. Ryan one held in St. Louis and the other by the First National Bank of Emporia, Kansas, are my own personal obligation, and I hereby agree to protect the same.

Yours truly, WILLIAM MARTINDALE.

33 Q. You know the signature of William Martindale?
A. I do.
34 Q. Have been acquainted with it for a number of years?
A. Yes.
35 Q. Was the statement just read to the stenographer signed by William Martindale?
A. It was.
36 Q. I notice that you testified that at one time Cross and Martindale had a $35,000.00 note fall due May 2nd, 1898, in New York and that they discounted a $30,000.00 note at that time and took credit for the same. How was the balance of the indebtedness between $35,000.00 and the discount derived on the $30,000.00 note paid?
A. It never was paid.
37 Q. How did the First National Bank of New York treat the matter?
A. The First National Bank of New York charged up to the account of the First National Bank of Emporia $35,717.50 and credited to the account of the First National Bank of Emporia on
99 their books with the proceeds of the $30,000.00 Martindale and Cross loan, $29230.00 the effect of these entries being to reduce the balance of the First National Bank of Emporia at the First National Bank of New York to the amount of $6487.50.
38 Q. That is to say the balance of that note was paid then by the First National Bank of Emporia?
A. It was, that is by being charged to their account in New York.
39 Q. I believe you stated that at the time they discounted, at St. Louis, the $10,000.00 Eskridge note and the $10,000.00 Nation note that they also charged certain maturing notes, namely, the Nation note for $6786.45 and a $10,000.00 W. J. Ryan note. How was the difference between the discount derived from the Eskridge and Nation notes and the amount charged up adjusted?
A. The Fourth National Bank of St. Louis credited to the account of the First National Bank of Emporia on their books on October 13th, 1898, the proceeds of the discount of the Eskridge and Nation notes referred to for the use of Martindale and Cross, $19,871.66 and at the same time charged to the First National Bank of Emporia the notes of Nation and Ryan amounting to $26,786.45 and the difference $6,914.79 was never adjusted or paid up to the time of the failure of the First National Bank of Emporia.
40 Q. That is to say the difference was paid by the First National Bank of Emporia in substance.
A. Yes, it was paid out of their account at St. Louis.

Redirect examination by Judge CUNNINGHAM:

1 Q. You may state whether or not there was ever an Eskridge note discounted by the Fourth National Bank of St. Louis prior to the one that they now hold, if you know.
A. There was some prior, I can't give the date.

2 Q. How soon prior to the date of the one they now hold?

A. I did not find any record on the books here of the discounting of an Eskridge note at the Fourth National Bank of St. Louis on any date immediately preceding the discounting of the Eskridge note on October 13th, 1898.

3 Q. You are not prepared to say are you that the Eskridge note now held by the Fourth National Bank of St. Louis is not a renewal of another Eskridge note of like amount and tenor?

A. No, I am not.

H. P. CLARK.

Testimony of J. M. Johnson.

The defendant F. C. Newman now offers the testimony of J. M. Johnson, he being first duly sworn testifies for and in behalf of the defendant, F. C. Newman, administrator.

100 1 Q. You may state your name, age and residence.

A. J. M. Johnson, Lyon county, Kansas, forty-five.

2 Q. How near do you live to Emporia and how long have you lived there?

A. I live now six miles. I have practically lived in that near Emporia for forty-three years.

3 Q. State how long you have known or had known C. S. Cross, late president of the First national bank and William Martindale, vice-president.

A. Well ever since I can remember. Since I have been in the State, we all lived here together.

4 Q. For how many years before the closing of the bank had you done more or less business at that bank?

A. About twenty-four or twenty-five years.

5 Q. State in a general way the principal business you had with that bank.

A. Well, when we had any money, we had it there on deposit and when we wanted any money, we went there and borrowed it.

6 Q. What did you use money for?

A. Always in the cattle business.

7 Q. With whom at that bank, did you personally make your arrangements for getting money to handle cattle with?

A. H. C. Cross, in his lifetime, when he was president of the bank, C. S. later.

8 Q. I will ask you, when you were doing business with H. C. Cross, during his presidency of the bank, whether William Martindale was there much or not.

A. I don't think very much. As I remember, I think he did not live here then, not until awhile before Cross went out.

9 Q. After C. S. Cross became president, state whether William Martindale was present at the bank more or less, when you went there to do business.

A. Yes, sir. Most of the time, I think.

10 Q. State what the fact is in reference to C. S. Cross, as presi-

dent, deferring to William Martindale as to large sums you might need in your business.

The complainant objects to this question, it is calling for an opinion of the witness and not a statement of facts.

A. When I would go there in the fall to arrange for paying for a drove of cattle to be carried, during the season, he would say, he would have to talk to Mr. Martindale first and would let me know as soon as possible.

Complainant moves to strike out the answer, for the reason it is hearsay.

11 Q. State what the fact is, of Mr. Martindale as vice-president having charge of the management of the bank, when Cross was away or not.

101 A. I could not say. I never did any business there direct with Mr. Martindale.

12 Q. State whether you had any conversation with William Martindale, since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock held on Sunny Slope ranch.

This is objected to, for the reason it calls for hearsay evidence.

A. Yes, I did.

13 Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing.

This question objected to, because it calls for hearsay evidence and the parties, the complainant and cross-complainant are not bound by any statements of Mr. Martindale.

A. The Monday morning, after the bank closed, I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as too how he expected that the bank would realize this money. He put a good deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it about $40,000.00 and said he thought it would realize $40,000.00 and then the depositors would get that and get it soon, if nothing (hind-red) the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, "So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then

with the good paper, that I know must be good and then with my property behind that too, that is unencumbered, there is no question but what you will get your money and you will get it, if I have to go without a home and wear old clothes." This is — substance my conversation with him. I went away feeling very well satisfied.

102 The complainant and cross-complainant move to strike out the answer of the witness, because the same is hearsay, in addition to the other reasons given and that they are not bound by anything Mr. Martindale may have stated.

14 Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so, in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors.

This question is objected to by the complainant and cross-complainant, for the reason given in the last above question objected to and for the reason given in their motion to strike out.

A. I asked him the question, if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank. "None in the least. It was an impossibility for it to be." That is all I now remember.

15 Q. Did you have any subsequent conversations with Mr. Martindale? If you did, state as near as you can, time, place and conversation.

The complainant and cross-complainant object to this, for the reason given above.

A. We had a talk with Mr. Martindale in Henning's office later on.

16 Q. John Henning's?

A. Yes. It was just about on this same line. He told us that the Sunny Slope funds would go into the bank, that the depositors would get that.

17 Q. Did you have any other conversation with him after that?

A. I don't think I ever talked with Mr. Martindale, after that or before, except these two conversations, on the Sunny Slope business. We had several conversations with him, but not on that point.

18 Q. This Monday you mention, was Nov. 21st, '98. How soon after that, would you say it was that you met him or was with him at John Henning's shop?

A. It was some time the last half of April. I cannot say just exactly what date.

19 Q. Of this year?

A. Yes, but I cannot give the exact date.

20 Q. In either of the conversations, the one had Nov. 21st, '98, at Mr. Martindale's residence and the other which you locate as
103 about April of the present year and at John Henning's office, did Mr. Martindale say anything about himself having any

claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

Objected to for the reasons given above.

A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was "like a new-born babe." He did not have no cinch on the Slope business, had nothing to do with the Slope business, never did and with his own property, he could not do anything. I told him I thought he was "a pretty big kid."

21 Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch.

Objected to for reasons given above.

A. No.

Cross-examination:

1 Q. You gathered, did you John, from Mr. Martindale in these conversations, that he was willing that his property and all that he had should go into the payment of the debts due the depositors.

A. The first conversation, I understood it that way.

2 Q. Did he limit that proposition in his last conversation?

A. I found out before the last conversation, that he was not doing what he agreed to do.

3 Q. That is to say, you had ascertained that he was managing his own property to his own interest?

A. As much as possible.

4 Q. And you talked with him about that matter?

A. Yes. I told him I thought he was making a mistake.

5 Q. And it was in response to that suggestion from you, do you think, that he made the statement he did?

A. He made the statement before I told him, that I thought he was making a mistake.

Q. But your conversation was based upon the proposition in your own mind, that he had done with his own property, as you had supposed he would do?

A. Well, I suppose you may put it that way. Yes.

6 Q. You say in neither of these conversations, there was nothing said about a bill of sale?

A. No. I never heard anything about a bill of sale.

7 Q. There had been talk and that was what you expected would be done, that Mr. Martindale would turn his property over to
104 a trustee to be managed by the trustee and sold for the benefit of Martindale's creditors.

A. The first conversation was not, but at the last conversation, I think there was a trustee talked about and at that time there had been one appointed, that is, agreed upon.

18 Q. That agreement did not finally go through?

A. It seems it did not.

19 Q. That was what you meant by talking to Mr. Martindale about having made a mistake in that he had not turned his property over and yield- the possession to a trustee and that he had been selling some and using the proceeds for himself.

A. At that time, he had not been selling any, I think he had not sold any up to that time.

20 Q. What was the immediate cause then of your talking to Mr. Martindale?

A. From the evidence I gathered from the gentleman in the first conversation.

21 Q. There had been no developments since the first conversation and up to the time of the second that would lead you to believe he was not intending to turn his property over.

A. He had not paid any of his assessment, now was he trying to. When we had the last conversation and other conversations we had before that, he was going to meet all obligations as fast as they became due and going to meet his stock assessment and he did not do it, consequently we were "wooling him over the coals" a little.

22 Q. Then it was because Mr. Martindale had not paid his stock assessment that you were complaining of him, at the time the conversation was had in John Henning's office?

A. That is one of the causes.

23 Q. If there is anything else, please state it.

A. Well, he was not making any effort, we did not think on his part to realize off his property and get the money in to the bank and settle up what he owed.

J. M. JOHNSON.

Testimony of Mr. C. S. Jobes.

The defendant, F. C. Newman, now offers the testimony of C. S. JOBES, he being first duly sworn, testifies for and in behalf of the defendant, F. C. Newman, administrator.

1 Q. Mr. Jobes, you may state your name, residence and occupation.

A. C. S. Jobes, residence, Wichita, Kansas, occupation national bank examiner.

2 Q. I will ask you to state if you examined the First National Bank of Emporia, Kansas, in November last and if so, state
105 when you commenced the examination and when it closed.

A. I did examine the First National Bank of Emporia, Kansas, commencing the same on November 9th, in the morning, and concluding the same about eleven p. m., November 15th, 1898.

3 Q. You may state, if after that examination you took charge of said bank as national bank examiner and if so, how long you remained in charge of said bank as examiner and if afterwards you were appointed receiver. You may state time, the length of time you conducted the business of said bank as receiver.

A. I did take charge of the bank as examiner, closing its doors in

that capacity on Nov. 16th, 1898, about 12.30 p. m. and immediately assumed charge and control of the affairs of the bank as receiver on telegraphic instructions from the Comptroller of the Currency and continued to act in that capacity until the 16th day of Feb'y, 1899.

4 Q. While you were examining the bank, you may state if you had any conversation with Mr. Martindale and C. S. Cross with reference to an indebtedness that existed to the First National Bank of New York. If so, state fully what they said about that indebtedness; also state in that connection if you had any conversation with either Mr. Cross or Mr. Martindale, during the time above mentioned, concerning any indebtedness to the Fourth National Bank of St. Louis, Mo., and if so state fully and in detail.

To this the complainant and cross-complainant object, for the reason it calls for hearsay evidence and that the complainant and cross-complainant are not bound by anything that is said by William Martindale or C. S. Cross.

A. I had conversations with both Mr. Cross and Mr. Martindale with reference to the indebtedness to both the New York and St. Louis banks referred to, during the course of the examination to which I have referred. I, however, had a conversation with Mr. Cross relating to the New York indebtedness, at a time prior to the examinations, which I have referred to, but during the course of the examination, as I stated, I had conversations with both of them in regard to the two indebtednesses referred to. The conversation with reference to the New York indebtedness, as well as the St. Louis indebtedness, that were had while the examination was in course, was suggested, when I informed Mr. Cross and Mr. Martindale that I had discovered discrepancies between the accounts, as rendered by the New York and St. Louis banks and the books of the First National Bank of Emporia and was
asking for an (expla-tion) as to who received the benefit,
106 resulting from those discrepancies amounting to between six
and seven thousand dollars, in the case of the New York bank and to between twenty and twenty-five thousand dollars, nearly twenty-five thousand dollars, in the case of the St. Louis bank. There was no question at this time as to the discrepancy. That was admitted and I wanted to be informed as to who had received the benefit growing out of these discrepancies and took up the matter of the discrepancies, item by item, as they had been accumulating through several months. Mr. Cross informed me that the discrepancies, in the two accounts, as I had discovered them, were substantially correct. I then put to the question, as to who had received the benefit, growing out of these discrepancies and who owed the First National Bank of Emporia on account of the same. Mr. Cross (expa*l*ined) to me how each item of discrepancy had occurred, stating that so much was his individual liability and so much was the joint liability of himself and Mr. Martindale. I had a memorandum of the discrepancies in my hand, at the time, and turned to Mr. Martindale, asking him if the amounts named by Mr. Cross, as being a joint liability of Martindale & Cross was correct and

whether he recognized his liability thereunder and he answered, that they were correct and that he recognized his liability to that extent. There was still other discrepancies in other accounts, but I only give that, which refers to the two discrepancies in the New York and St. Louis accounts. Now that was a conversation had with both Mr. Martindale and C. S. Cross. I had other conversations with Mr. Cross separately from Mr. Martindale and with Mr. Martindale separately from Mr. Cross, more particularly with reference to the New York indebtedness. Referring to the conversation had with Mr. Martindale with reference to the New York indebtedness, I stated to him that I had discovered a large discrepancy in the New York account, in an examination, which I made, of the First National Bank of Emporia in the month of May, 1898, stating to him what Mr. Cross' (expla-tion) of that discrepancy was and asking him as to whether the explanation was correct, which explanation was to this effect: But I will state further, in this connection, that the New York bank advised me in my capacity as examiner that the First National Bank of Emporia was indebted to them in the sum of thirty-five thousand dollars ($35,000.00). These figures not appearing on the books of the First National Bank of Emporia, I asked for an explanation and received from Mr. Cross an explanation, that it was not the indebtedness of the First National Bank of Emporia, but was the indebtedness of Martindale & Cross. That statement was later verified by the statement of the First National Bank of New York, when
107 they informed me, they were mistaken as to its being the indebtedness of the First National Bank of Emporia, Kansas, that it was the indebtedness of Martindale & Cross to which they referred. In the conversation had with Mr. Martindale, he verified that statement and stated the First National Bank of Emporia was not, so far as he knew, indebted to the First National Bank of New York, but Martindale & Cross were indebted, as Mr. Cross had stated to me and the New York bank had also stated. This practically covers the conversation had with reference to these two accounts.

5 Q. What did Mr. Martindale ever say, if he said anything, at any time, concerning the St. Louis indebtedness other than the discrepancy you have described?

To this question, the complainant and cross-complainant object, for the reason it calls for hearsay evidence and that the complainant and cross-complainant are not bound by anything that is said by William Martindale or C. S. Cross.

A. I think we had no conversation with reference to the St. Louis discrepancy further than to determine just what the liability of Martindale & Cross was to the First National Bank of Emporia on account of the St. Louis discrepancy.

6 Q. Did Mr. Martindale say anything to you about the $20,000.00 indebtedness Martindale & Cross owed the St. Louis bank?

To this question, the complainant and cross-complainant object, for the reason it calls for hearsay evidence and that the complainant

and cross-complainant are not bound by anything that is said by William Martindale or C. S. Cross.

A. In this connection he did.

7 Q. Please state what that was.

This question objected to, for the reasons above.

A. The St. Louis discrepancy grew out of certain notes being charged by the Fourth Nat. Bank of St. Louis to the account of the First National Bank of Emporia, but which sums were not credited on the books of the First National Bank of Emporia to the account of the Fourth National Bank of St. Louis, leaving the discrepancy to which I have referred and Mr. Martindale stated that this discrepancy grew out of certain indebtedness that was owing by himself and Mr. Cross and certain indebtedness for which Mr. Cross himself was personally responsible.

8 Q. You may state if you ever had any conversation with Mr. Martindale or Mr. Cross about Mr. Cross's indebtedness to the
108 bank and the manner in which they expected it would be paid. If you had any such conversation, please state fully all that was said upon that subject-matter.

This question objected to by the complainant and cross-complainant for the reason it calls for hearsay evidence and that the complainant and cross-complainant are not bound by anything that is said by William Martindale or C. S. Cross.

A. I particularly call to mind a conversation had with Mr. Cross and Mr. Martindale, during the evening preceding the closing of the bank, when they were going over with me the prospects and the assets from which Mr. Cross expected to realize a large sum of money, which money would come into the bank immediately and be applied to the retirement of Mr. Cross' indebtedness to the bank. I want to state, however, that I had a conversation with Mr. Martindale in the absence of Mr. Cross, during the first day and a half, that the examination was in course, last November. When I came here Mr. Cross was absent, I think, Mr. Martindale stated, in Chicago. I spent the day Thursday and until about three o'clock Friday afternoon in examination of the bank before Mr. Cross returned. During that interim, I had a conversation with Mr. Martindale with reference to Mr. Cross' indebtedness to the bank. Then he advised me what Mr. Cross' resources were; what his prospects were with reference to the sale that was then advertised; what other property he had; what opportunities he had to sell it; how much money he (Mr. Martindale) believed would be realized from that sale and the length of time he believed would elapse before the same would be realized and turned into the bank and applied to the retirement of Mr. Cross' indebtedness, then on the evening to which I have referred, namely, just immediately preceding the closing of the doors of the bank, this same matter was gone over with Mr. Martindale & Mr. Cross. Mr. Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by the 8th day of Decem-

ber, 1898, he would unquestionably have $40,000.00 to turn over to the bank, as the result of the proceeds of his advertised sale and show me telegrams and correspondence from prospective buyers for the residue of the cattle and for Sunny Slope farm and insisted within a given length of time, that, that money would be in hand and would be applied in the same way.

9 Q. Was Mr. Martindale present when this conversation was had between you and Mr. Cross?

A. Yes. As to the amount that would be realized from this property, Mr. Cross insisted it would reach safely $90,000.00. I asked Mr. Martindale for his judgment with reference to the amount and he stated that his best judgment was, there would be no
109 disappointment as to the estimate Mr. Cross had placed upon the proceeds of the sale of the property. I then put the question to them as to whether any of their creditors had liens upon this property, that would serve, in any way to interfere with this money coming in promptly to the bank. They both answered that there was none and in further response to that question, Mr. Cross said, he thought he could have $40,000.00, the money realized from the advertised sale, in the bank, before closing hours on December 7th. Mr. Martindale suggested that he had better not be too positive about that, as it would be too close connections, that he had better give himself a little more time.

10 Q. Was there anything said, during that conversation about William Martindale having a bill of sale on the cattle out at Sunny Slope? If so, state fully what was said upon that subject-matter.

To this question, the complainant and cross-complainant object for the reason it calls for hearsay evidence and that the complainant and cross-complainant are not bound by anything that is said by William Martindale or C. S. Cross.

A. There was no reference made to a bill of sale, affecting the property of Mr. Cross on Sunny Slope, during the conversation I have reference to or any I have referred to.

11 Q. This last conversation you refer to, about the sale of Sunny Slope, occurred at what time?

A. Well, I could not state closer than this. It was between five o'clock in the evening of Nov. 15th, '98, and eleven o'clock that night and I want to explain why I cannot be more specific as to the time, which is this. We had, under consideration, this matter, at a conference had after the bank closed before supper, and then had a conference after supper, which continued, until about eleven o'clock and I want to state further that in that same connection it was probably after supper, for the reason that I was examining the officers of the bank und-r oath, at that time, and the oath was not administered, as I now recall it, until after supper.

12 Q. Are you acquainted with Thomas Evans?

A. Yes, sir.

13 Q. When did you first see him?

A. The best of my recollection now is, it was on Monday, follow-

ing the closing of the bank, which would make it the 21st of November, 1898.

14 Q. You may state now, if you made any arrangement with Mr. Evans by which you were to pay the expenses of taking care of Sunny Slope. If so, state where and what arrangements were made.

110 A. I did make such arrangement with Mr. Evans, after having made some inquiry as to Mr. Evans' standing and ability and, in view of the fact, that he had been manager at Sunny Slope for Mr. Cross. Whether it was during the first conversation, at my first meeting with Mr. Evans, I do not now recall, but it was either at the first or second meeting that I informed him, that I regarded the personal property at Sunny Slope as the property of the bank and I desired that he should continue to manage the business, as he had heretofore done, consulting with me in reference to the same and to avail himself of any opportunities to dispose of stock, that might present themselves, suggesting, that perhaps it would be well to make no sale for property listed in the prospective sale and that I would furnish him all necessary funds to pay the current expenses incidental to, the farm, after the day of Mr. Cross' death.

15 Q. You may state if you did pay the expenses of maintaining the personal property at Sunny Slope farm, including feed, wages, &c., from the date of Mr. Cross' death, until the property was sold.

A. I did.

16 Q. You may state, if you remember any particular sale made by Mr. Evans. If so, state fully what that was, concerning that sale.

A. Mr. Evans informed me early in the week, following the week, during which the bank was closed, that he had a purchaser at the farm for two calves. The price on same had been, as I now remember, practically agreed upon, some days before and wanted my direction, as to whether the sale should be closed for the price offered for the two calves, which price was $500.00. I advised him, that if it was a satisfactory price, in his judgment, as much as we would reasonably expect to realize from them, to close the sale. He then informed me, it would be necessary for him to deliver the calves at some railroad point a few miles distant, I think it was Hartford. I am not exactly clear as to that. I authorized him to make the delivery, suggesting to him to be sure it was a cash-delivery sale. That was early in the week, following the week, during which the bank was closed and it was probably on Tuesday or Wednesday, the 22nd, or 23rd of November, 1898.

17 Q. You may state whether you received pay for these calves and if you ever received any pay for them, the date you received it?

A. I received the money from Mr. Evans a couple of days later. Probably the 25th of November, 1898, Mr. Evans came into the bank and advised me he had made the delivery and asked me if I would take a check in payment for the calves. I was laboring

111 under the impression at that time, and did not know any differently, until I heard his testimony the other day, that he was

offering to pay for the calves by the check of the purchaser. I said to him I would much prefer to have the cash and he went out and was gone from the bank but a very few minutes and came back and handed me $500.00.

18 Q. You may state, if you went out to Sunny Slope some time after you closed the bank and if so, give the date of your going out there and just what occurred, after you got there?

A. Early in the morning, of November 28th, I went to Sunny Slope, reaching there, probably not later than six o'clock in the morning, found Mr. Evans temporarily absent, waited something like an hour for his return and upon his return, informed him I was there, for the purpose of taking formal possession of the personal property on Sunny Slope and desired him to continue in the management of the property and to confer with me with reference to all matters pertaining to that business.

19 Q. You are sure that the sale of the two calves occurred prior to the time you have just described now, when you went out and took possession of Sunny Slope?

A. Absolutely certain.

20 Q. Up to the time you went to Sunny Slope farm, on the morning of the 28th, you may state if you ever had any conversation with Mr. Evans or with Mr. Martindale about Martindale's claiming to have a bill of sale on that stuff out there?

A. I never had any conversation with either of them with reference to any claims of Mr. Martindale to that property.

21 Q. You may state why you went out on the morning you did go out and did what you did out there, if there was no conversation between you and anybody as to possession? Please state it?

A. My purpose in going at the time I, did, was, because of the fact that an administrator for the C. S. Cross estate had been appointed late on Saturday evening, the 26th of November, 1898, and that, inasmuch as I had not taken possession by going on the premises, I deemed it best, in view of the appointment of an administrator to take that step.

22 Q. You held possession, until all of the property was disposed of?

A. I did.

Cross-examination by the complainant and cross-complainant:

1 Q. The property on Sunny Slope ranch was disposed of, under the agreement, which is set out in the complainant's bill of complaint and marked Exhibit —, was it not?

A. Yes, sir.

112 2 Q. You may state Mr. Jobes, whether or not in any conversations had between you and Mr. Cross, or Mr. Martindale or Cross and Martindale, either of them stated that this New York indebtedness or the St. Louis indebtedness was as between Cross and Martindale, the debt of Cross?

A. To the extent of which I stated on direct examination. Yes.

3 Q. Please to state that extent again?

A. The indebtedness of the First National Bank of New York, represented by notes, held by the New York bank, was stated by both of them as being the indebtedness of Martindale and Cross. The discrepancies to which I refer, was designated as partially the indebtedness of Martindale and Cross and partially the indebtedness of C. S. Cross individually.

4 Q. Can you state the amount, that they said was the indebtedness of C. S. Cross?

A. Only approximately, without the memorandum, which I made, I would approximate it at from seven to ten thousand dollars, Mr. Cross' personally and at from nineteen to twenty-three thousand dollars, Martindale & Cross' jointly.

5 Q. Now as to this joint indebtedness, was there anything said by either as to whether or not that this money as between Cross & Martindale should be paid by Cross or as between them both should be paid by the First National Bank of Emporia or did they simply treat it as it appears upon the face of the papers to be the joint debt of Cross & Martindale?

A. There was no suggestions in any of the conversations had with reference to these matters, that it was a debt of the First National Bank of Emporia. Our conversation was had, for the purpose of determining just what the liability of Mr. Cross was, growing out of these discrepancies and just what the liability of Martindale and Cross and William Martindale was and I made the figures as they gave them to me and aggregated the sums in their presence. They both assented to the correctness of the figures in amounts determined.

6 Q. Did this discussion proceed upon the theory of legal liability or moral liability?

A. The question of moral and legal liability, as I now recall it, did not at the time, enter into the question. They were merely endeavoring to determine what the exact liability of the two was.

7 Q. That is the liability of either or both to the New York and St. Louis banks?

113 A. Yes, and to the First National Bank of Emporia.

8 Q. Was the matter of the liability of either or both Martindale & Cross as between themselves as to the matters, which appeared all straight upon the books, relative to the accounts in New York and St. Louis discussed between you; that is to say, was there any discussion about that which appeared to be straight? I am not now referring to the discrepancies.

A. I am not able to say positively, but am inclined to think, that for the reason, there was so much that was not straight, that we were discussing, that we were kept busy, discussing these matters.

Further cross-examination of Mr. JOBES:

9 Q. In the conversation with Mr. Martindale and Mr. Cross, you mention discrepancies, that you called their attention to. I would like to have you explain what you mean by those discrepancies?

A. I mean a difference between the amounts claimed by the First National Bank of Emporia to be due it by the New York and

St. Louis banks, which amounts showed to be greater than the amounts admitted by the New York and St. Louis banks to be owing it by them.

10 Q. That is, as I understand it, the statements of the First National Bank of New York and the Fourth National Bank of St. Louis, after showing the debts now claimed by them, arising upon the paper, which has been mutually made or endorsed by C. S. Cross and William Martindale, showed a balance due them from the First National Bank of Emporia, that the accounts of the First National Bank of Emporia with them did not show?

A. No you have included in your question, the indebtedness of Martindale & Cross to the respective banks, which, in no way, figures in these reconcilements, which I have made and which I spoke of, when I referred to the discrepancies. The proceeds of notes, discounted for account of Martindale & Cross appear in the accounts current of the two banks, under consideration, as having been credited to the account of the First National Bank of Emporia, at the same time, equal or larger sums, generally larger, appear to have been debited to the account of the First National Bank of Emporia, on account of maturing notes discounted for the account of Martindale & Cross. The proceeds of notes similar amount are credited in accounts current of the New York and St. Louis banks, rendered to the First National Bank of Emporia, as those sued upon and I presume and believe they are the same notes.

114 Redirect examination:

1 Q. In these conversations with Mr. Martindale, he admitted that he and Cross jointly owed the First National Bank of New York a $30,000.00 note and that they had discounted two $10,000.00 notes at St. Louis, that they were both liable on, did he not?

Objected to by the complainant and cross-complainant, because it calls for hearsay evidence.

A. As to the New York $30,000.00 indebtedness, yes, unqualifiedly. As to the St. Louis $20,000.00, my recollection is not clear.

2 Q. In addition to that, he also told you how much of the shortage in the New York and in the St. Louis accounts that Martindale and Cross derived the benefit from?

A. He did.

C. S. JOBES.

JOHN HENNING, being duly sworn, on his oath testifies and says:

1 Q. You may state your name and residence?
A. John Henning, Emporia, Kansas.
2 Q. Your business?
A. Meat business.
3 Q. How long have you been in business in Emporia?
A. 26 years.
4 Q. Are you acquainted with William Martindale?
A. Yes, sir.

5 Q. How long have you known Martindale?

A. Well, I have personally known him about 17 or 18 years.

6 Q. Did you transact business with the First national bank, prior to its failure, and if so, how long?

A. 26 years. I never did business anywhere else.

7 Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so state what he said with reference to the same?

By Judge CUNNINGHAM: That is objected to by the complainant and the cross-complainants because the same calls for hearsay evidence, and that the rights of the complainants and the cross-complainants cannot be impaired by what Martindale might have said.

A. Well, we had a committee meeting about February 23rd in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what
115 we were going to get; and he went on and said that their resources were two or three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unincumbered that he was willing to put in and that we would get 100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why we would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000.00 or $55,000.00, something like that, and that he was amply able to make the balance.

8 Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

By Judge CUNNINGHAM: This question is objected to by the same parties, for the same reasons given above.

A. He did not say anything about a bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money.

By Judge CUNNINGHAM: The complainant and the cross-complainant move to strike out the answer of the witness because of the reasons given above, and because the same is not (*responsible*).

JNO. HENNING.

GEORGE PLUMB, being duly sworn, on his oath testifies and says:

1 Q. You may state your name and residence?

A. George Plum; live in Emporia.

2 Q. How long have you resided in Lyon county, Mr. Plumb?

A. 42 years.

3 Q. At the time of the failure of the First national bank and for some time prior thereto were you transacting business with said bank?

A. I was.

4 Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

5 Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes, sir, a number of conversations.

6 Q. You may state any conversation that you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

By Judge CUNNINGHAM: The complainant and the cross-complainant object to this question for the reason that the same
116 calls for hearsay evidence, and because Martindale could not by any admissions (*impare*) the rights of the complainant and cross-complain-t herein.

A. Why at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said I have property and I don't think you people are going to lose very much.

7 Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

By Judge CUNNINGHAM: This is objected to for the reasons above given.

A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named, I told him I thought that probably could not be done now, and he said he thought it could, and, I think, the man would still take the stuff. I think $41,000 is what he said they expected would be what would be gotten out of the balance of that stuff. This conversation was before the sale.

8 Q. When he spoke of what Sunny Slope would realize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

By Judge CUNNINGHAM: This is objected to for the reason above given.

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

9 Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

By Judge CUNNINGHAM: Objected to for the reason above given.

A. I don't think I ever had a talk with him about the bill of sale, never mentioned it.

Upon cross-examination, by Judge Cunningham, witness testifies as follows:

10 Q. Mr. Martindale was speaking of Sunny Slope and the personal property there as being the property of C. S. Cross, was he not?

117 A. I suppose so, I never knew anything else.

11 Q. He was not speaking of it as the property of the First national bank?

A. No.

GEO. PLUMB.

CHARLES JOHNSON, being duly sworn, on oath, says:

1 Q. State your name?

A. C. W. Johnson.

2 Q. Where do you reside?

A. Lyon county.

3 Q. How long have you lived in this county?

A. 42 or 43 years.

4 Q. Are you acquainted with William Martindale?

A. Yes, sir.

5 Q. How long have you known him?

A. Well, I presume a lifetime.

6 Q. Did you do business with the First national bank at the time it failed and for some time prior thereto?

A. Yes, sir.

7 Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank failed? If so, state the time and the conversation as nearly as you can recall it?

By Judge CUNNINGHAM: This question is objected to by the complainant and cross-complainants for the reason that it calls for hearsay evidence, and that their rights cannot be impaired by anything that Mr. Martindale might say.

A. Well, I think I had a talk with him about a week or ten days after the bank closed, a few days afterwards I met him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there and he said the Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar.

C. W. JOHNSON.

Testimony of John Stotler.

JOHN STOTLER is produced as a witness on behalf of defendant Newman and being first duly sworn deposes and says:

1 Q. You may state your name, age and residence?

A. Well, I am 50 years old, my last birthday on the 13th day of February. John Stotler, Lyon county, Kansas.

2 Q. You remember the time the First national bank failed?

A. Yes, sir.

118 3 Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes, sir.

4 Q. If so, please state where that conversation occurred and the substance of it?

The complainant and cross-complainant object, for the reason it calls for hearsay evidence and because whatever William Martindale may have said, does not bind the complainant or cross-complainant.

A. I had a conversation with him at the Whitley hotel, I judge about a week, after the failure of the bank and Mr. Johnson was with me, Mr. Chas. Johnson, and he told us, we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that would come right into the bank, said he did not see why we would not get all our money.

5 Q. Did he say anything to you about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not.

JOHN STOTLER.

Testimony of H. P. Clark.

H. P. CLARK is produced as a witness and offers testimony on behalf of defendant Newman.

1 Q. You may state, if you know, what position Mr. C. S. Cross occupied with reference to the First national bank at the time of his death?

A. President of the bank.

2 Q. How long had he been president?

A. From January 12th, 1892.

3 Q. Prior to that time what official position did he occupy with reference to the bank?

A. He was cashier of the bank.

4 Q. You may state what you have in your hands?

A. The minute book of the First national bank, containing the records of the stockholders' and directors' meetings.

5 Q. You may now state the date, if you can, that Mr. Cross was elected cashier of the First national bank?

A. He was elected cashier Oct. 15th, 1881, to take effect Nov. 1st, 1881.

6 Q. Did he continue to act as cashier, until he was elected president?

A. The records show he was cashier from that time, until he was elected president of the bank.

7 Q. Who constituted the discount board of the bank, if it had one?

119 A. They had a discount board, composed of William Martindale, C. S. Cross and H. F. Martindale.

8 Q. Was that the board, as shown by the records of the bank, at the time the bank closed?

A. Yes.

9 Q. You may state how long these members constituted the discount board of the bank?

A. From the 12th day of January, 1897.

10 Q. Was there any change in the personnel of that board from Jan'y 12th, 1897, up to the time the bank failed?

A. No. There was no change, as shown by the records.

11 Q. As shown by the records how often did this discount board meet?

A. Weekly.

12 Q. What other official position did Mr. C. S. Cross hold with reference to the bank, besides being cashier at one time and then president and besides being a member of the discount board?

A. Director of the bank.

13 Q. How long had he been director of the bank, prior to the time the bank failed?

A. He was elected Jan'y 12th, 1892.

14 Q. What official position did H. C. Cross occupy with reference to the bank from the time it was organized as a national bank up to the time of his death?

A. It was organized as a national bank on Dec. 12th, 1871. H. C. Cross was president of the bank from that date, until Jan'y 12th, 1892, and a director from that date, until his death in 1894.

15 Q. How was H. C. Cross related to C. S. Cross, if you know?

A. Father.

16 Q. State what relation H. F. Martindale occupied with reference to that bank, from the time he first became connected with it in an official way?

A. H. F. Martindale was elected director of the bank Nov. 9th, 1896, to fill the vacancy caused by the death of D. W. Holderman and was director of the bank, until it closed. On Jan'y 12th, 1897, was appointed as a member of the discount board and remained a member of the discount board, until the failure of the bank.

17 Q. Now is H. F. Martindale related to William Martindale, if you know?

A. Son of William Martindale.

18 Q. State what connection William Martindale had with the First national bank. I mean to state fully all his official connections with said bank up to the time it failed, as shown by the records?

A. Mr. Martindale was director of the First national bank from the date of organization in 1871 up to the date of the failure, was vice-president of the bank from January 8th, 1878, to date

120 of the failure of the bank and member of the discount board from January 12th, 1897, to the date of the failure of the bank.

19 Q. You may state, if you know, how much C. S. Cross owed the First national bank at the time of his death?

A. He owed the bank directly and indirectly, in the neighborhood of $300,000.00.

20 Q. You may state about how much he owed the bank upon Nov. 15th, 1898?

A. About the same amount.

21 Q. You may state about how much he owed the bank on July 12th, 1898?

A. About $250,000.00 directly and indirectly.

22 Q. You may state, if you can, about what he owed the bank in March, 1898?

A. Between $200,000.00 and $250,000.00.

23 Q. You may state about what he owed the bank in December, 1897?

A. About $200,000.00.

H. P. CLARK.

Testimony of F. C. Newman.

F. C. NEWMAN is produced as a witness on behalf of defendant Newman and testifies as follows:

1 Q. Mr. Newman you may state how long you have resided in Lyon county?

A. Twenty-one years.

2 Q. What official position do you hold with reference to the Citizens' bank?

A. I am president of the Citizens' bank.

3 Q. How long did you know Mr. C. S. Cross, previous to his death?

A. I have known Mr. C. S. Cross twenty-one years.

4 Q. I will ask you to state, if you are the administrator of the estate of C. S. Cross?

A. I am.

5 Q. You may state if you are acquainted with the value of real estate and personal property in this part of the State?

A. I am.

6 Q. You may now give an estimate of the property Mr. Cross owned at the time of his death, not counting the Sunny Slope property?

A. About $2500.00.

7 Q. You may state, if you know of any property Mr. Cross had in July, he did not have at the time of his death?

A. I don't know of any.

Cross-examination:

1 Q. Your estimate is for the estate that has come to your possession as administrator?

A. Yes, sir.

2 Q. You are not able to state that all of his estate has come to your possession as administrator?

121 A. I supposed that it had. All that we can find has come to my possession.

F. C. NEWMAN.

W. R. SMELSER is produced as a witness for F. C. Newman, administrator of the estate of C. S. Cross, deceased and being first duly sworn deposes and says:

Direct examination.

By J. JAY BUCK:

1 Q. You may state your name, age and place of residence?

A. W. R. Smelser, 57, Emporia, Kansas.

2 Q. Do you know defendant William Martindale and did you know C. S. Cross, late president of the First National Bank of Emporia, Kansas during his lifetime and if so, state when you first became acquainted with each.

A. Yes. I know them both. Became acquainted with C. S. Cross in '84, and became acquainted with Martindale about the year '85.

3 Q. Are you acquainted with the lay of the land and somewhat of its actual or assumed mineral productions around Galena, Kansas?

A. Somewhat. Yes, sir.

4 Q. If you were ever down there managing or giving attention to mining business, state when and for how long and who, if any one, was financially interested therein with you?

A. I went down there in the spring of '96 at the instance of Mr. Cross. At the beginning I was interested with Charley Cross.

5 Q. Who were you interested with later on, if any one, besides C. S. Cross?

A. Well, if you will allow me to make a statement, I can tell you just the conditions. I went there in the spring, probably in the summer, I will say towards fall, I negotiated for a piece of ground and Charley came down himself. It was C. S. Cross and myself up to this time. Now he says, "Smelser, when I negotiate with you, I want us to enter into a stock company, you and myself and Mr. Martindale." "Billy has been putting up his money with mine" was just the remark he used and he and I at that time laid the preliminaries for a stock company. Later on, probably a few months later, I came to Emporia and we organized a stock company, at the First national bank, Mr. Martindale, Mr. Cross and myself were the stockholders.

(The plaintiff, The Fourth Nat. Bank of St. Louis, and the defendant, The First National Bank of New York move to strike out this answer of the witness, the same being irrelevant, immaterial and incompetent and hearsay and not responsive to the question.)

122 6 Q. You may look at this memorandum book, which is a pass book of the First National Bank of Emporia, Kansas,

and state whether that is or is not the subscription to such stock and such agreement as you just mentioned?

(This question objected to, because it is irrelevant, immaterial and incompetent.)

A. Yes, sir.

7 Q. You may look and see if those are or are not the genuine signatures of C. S. Crooss, William Martindale and W. R. Smelser, yourself?

A. It is my judgment that they are. I think so.

8 Q. It is your own?

A. Yes, sir. The others were written at the same time.

9 Q. I will ask you if you are acquainted with the signatures of Cross and Martindale?

A. Yes, sir. I take it to be their signatures.

(Newman, administrator now offers this book in evidence, which reads as follows:)

"We, the undersigned, hereby subscribe to the capital stock of the Smelser Mining Co., the No. of shares respectively set opposite our names—said shares being the par value of $10.00 each.

C. S. Cross.	68	shares at	10.00 ea.
W. Martindale	67	" at	10.00 ea.
W. R. Smelser	..... .15	" at	10.00 ea."

(Which is objected to by said plaintiff, The 4th Nat. Bank, St. Louis, Mo., and defendant, First Nat. Bank, N. Y. because the proposed evidence is immaterial, irrelevant and incompetent and not responsive to the question in the case.)

10 Q. You may state whether as a fact stock was issued to C. S. Cross, William Martindale and yourself by the Smelser Mining Company?

(A.) (We object to the question, that is the Fourth Nat. Bank, of St. Louis and the First Nat. Bank of New York, for the reason that the same is irrelevant, immaterial and incompetent and not the best of evidence.) (The same objection by Mr. Graves.)

A. That is my recollection, the stock was issued to us by the Smelser Mining Company, but I would not be positive right now, until I refresh my memory a little bit on that.

11 Q. Did you act as secretary for said mining company?

A. Well, I acted as secretary and manager.

123 12 Q. I now exhibit to you what purports to be a certificate of 67 shares of $10.00 each, dated March 8th, 1897, No. 2 and made to William Martindale and ask you if you signed "W. R. Smelser" as secretary there and if that is or is not one of those certificates of stock of that mining company marked "A" by the examiner?

A. Yes, sir. It is. I signed my name.

No. 2. Shares $10.00 each. 67 shares.

Capital $1,500.00.

The Smelser Mining Company of Galena and Emporia, Kansas.

This is to certify, that W. Martindale is the owner of sixty-seven shares of ten dollars each in the capital stock of the Smelser Mining Company of Galena, and Emporia Kansas; transferable only upon the books of the said company, in person or by attorney on the surrender of this certificate.

Witness the seal of the company and the signatures of the president and secretary at Emporia, this 8th day of March, 1897.

C. S. CROSS, *President.*

[SEAL.] W. R. SMELSER, *Secretary.*

"Exhibit A."

13 Q. I show you now what purports to be the oath of office of C. S. Cross, William Martindale and W. R. Smelser as directors of that corporation and sworn to before M. C. Little, March 8th, 1897, and ask you if it is the genuine oath of office?

(It is agreed that the questions heretofore asked and the questions hereafter asked in this examination shall be considered objected to by the plaintiff The 4th Nat. Bank of St. Louis and the cross-complainant, The First Nat. Bank of New York and William Martindale as being irrelevant, immaterial and incompetent without having thus specifically objected to each question.)

A. Yes, sir, that is correct.

(We offer this oath of office in evidence and ask the special examiner to append it to this deposition as a copy thereof—a copy by him certified and marked Exhibit "B" by the examiner.)

We, W. R. Smelser, W. Martindale & C. S. Cross do each of us selemnly swear that we will support the Constitution of the U. S., the constitution of the State of Kansas and that we will faith-
124 fully discharge our duties as directors of the Smelser Mining Company to the best of our abilities.

C. S. CROSS.
W. MARTINDALE.
W. R. SMELSER.

Subscribed and sworn to before me this 8th day of March, 1897.
[SEAL.] M. C. LITTLE,
Notary Public.

Exhibit "B."

14 Q. How late did you remain down there about Galena before finally ceasing your connection with that enterprise?

A. Well, some time along in the summer of '97.

15 Q. Who, if any one succeeded you?

A. C. E. Fuller.

16 Q. State whether or not you remained there for a time after he came upon the ground?

A. Yes, sir.

17 Q. State whether to your personal knowledge he was looking after mining claims there?

A. He was. Yes, sir.

18 Q. Did Fuller work this mat-er there continuously under the name of the Smelser Mining Company of Galena and Emporia, Kansas, or was it succeeded by some other corporation or partnership and if so, what name was its successors?

A. Well, I don't know. It was changed but I paid no attention to the successorship at all. I think it was named the Lomond Mining Company.

(That answer is objected to, because it is not responsive to the question and not the best of evidence.)

19 Q. Did your operations reach to Cave Springs?

A. Yes, sir. After Mr. Fuller took charge, I moved to Cave Springs, and looked after some mining interests there.

20 Q. Explain briefly what you had to look after, was it mining claims as miners understand them, developing them?

A. Well, it was sinking shafts and I was looking after the men, seeing that they did their work properly, paying them, etc.

21 Q. Did this Smelser Mining Company, composed of Cross, Martindale and yourself own the lands where you were developing mines, or lease them?

A. It was leased land.

22 Q. You may now state whether Fuller or the Lomond Mining Company took up, worked and had charge of these same leases that you had been controlling while managing the Smelzer Mining Company or were they different?

A. My understanding is the Lomond Mining Co. is another enterprise and that the Smelser Mining Co. work was abandoned after a time, after Fuller took charge of it.

125 23 Q. Do you mean that all the lands that you ever looked after for the Smelser Mining Company were totally abandoned or that just some portion of them were abandoned?

A. Some portion of it was retained and looked after by me.

24 Q. State then whether Fuller resumed, occupied and took up all that was left that the Smelser Mining Company had not abandoned.

A. The Cave Springs land was not abandoned, until after the Galena lead and zinc lands were abandoned. That was the part Fuller had direct supervision over.

25 Q. State whether or not you at some time turned over to C. E. Fuller all that you were continuing to look after for the Smelser Mining Company.

A. Well, I simply abandoned it. Did not attend to it at all. I left there and it was abandoned.

26 Q. About how much money did you expend down there for the Smelser Mining Company?

A. I could not answer that question.

27 Q. Was it several hundred or several thousand dollars?

A. It was several thousand dollars. How much I cannot tell.

28 Q. Did you come to Emporia to get this money that you expended in that enterprise there or was it remitted to you from Emporia or did you draw on some one at Emporia for it or was it in all three ways?

A. It was in all three ways. I drew for it, draft was sent to me for some part of it and some of it was paid to me while I was there.

29 Q. How many times, if at all, while you were down there did Mr. Martindale visit the premises there?

A. Well, he visited down there, while I was there two, three or four times, perhaps a time or two more. I cannot tell, two or three times anyhow.

30 Q. What did he do, if anything, while there in giving directions and conducting?

A. Well he looked the property over and advised with me about what was best to do &c. was about all he did.

31 Q. State whether or not, when Martindale was there on the ground or when you were here, if at any time he paid you any currency money.

A. He paid me $50.00 when he was down there one time. Gave me a check for $50.00 I do not remember at any other time that he individually gave me any money.

32 Q. As a general rule, who put up the money for the enterprise?

A. Charley Cross.

126 33 Q. Did you make reports in writing or not?

A. Yes. We corresponded back and forth. Nothing in particular we were not making any money.

34 Q. To whom did you write?

A. Cross.

35 Q. Always?

A. Always. I think. I don't remember ever writing to anybody else.

36 Q. You may state what interest Cross had, Martindale had and you had in that enterprise, while you were connected with it.

(That is objected to. The witness is not shown to possess any knowledge upon the subject and because it calls for an opinion and because it is not the best evidence.)

A. Mr. Cross and Mr. Martindale had $650.00 apiece and I had the balance. Those are the exact figures.

37 Q. Out of a total of $1500.00?

A. Yes sir, those are the figures.

38 Q. And you know those to be the figures?

A. Yes sir.

39 Q. I exhibit to you a draft, dated Nov. 30th, '96 apparently drawn by yourself upon C. S. Cross of Emporia, Kansas for $150.00 I ask you if that is a draft that you actually drew and on which you

received the money for it for that business down here and ask the examiner to attach a copy thereof as Exhibit "C?"

A. It was.

The Citizens' Bank of Galena.

No. —.

Report by this number.

Citizens' Bank of Galena.

GALENA, KANSAS, 11/30, 1896.

At sight pay to the order of Jno. McCullough $150.00 one hundred fifty no/100 dollars. Value received and charge to account of

W. R. SMELSER.

To C. S. Cross, Esq., Emporia, Kansas, First national bank.

"Exhibit C."

Customers' draft.

Endorsed on back: Pay Citizens' nat'l bank Kansas City, Mo. or order the Citizens' bank Galena, Kas. Jno. McCullough cashier. Previous endorsements guaranteed pay any bank or banker order Citizens' national bank, Kansas City, Mo. W. H. Seeger, cashier paid through clearing-house Citizens' bank Dec. 13/1896. Paid. Emporia, Kansas.

40 Q. In the regular course of business.

A. Yes sir.

41 Q. Previous to the organization of the Smelser Mining Company, who, if any one, owned that business there.

A. My understanding was that Charley Cross and myself. That was the arrangement we made when I first went down
127 there, that we were to be equal partners. I was to go down and spend my time and he was to furnish the money. That was the beginning.

42 Q. That arrangement kept up did it or did it not until the Smelser Mining Company was organized as a corporation and Martindale came in equally with Cross.

A. Martindale came in equally with Cross long before the corporation was carried out.

43 Q. About how long before the organization of this Smelser Mining Company was it that Martindale went in with Cross down there?

A. Some two or three months.

44 Q. Do you know from anything Martindale said what interest Martindale had in it at that time?

A. Not at that time. Not until the organization of the company—I did not know what interest he had.

45 Q. What interest did Martindale have in there with Charley Cross before the organization of the Smelser Mining Company, if you can tell from anything you ever learned from Martindale?

A. One-third interest.

46 Q. You may state whether to your knowledge Mr. Martindale was down there at that place and looking after the enterprise, previous to the organization of the Smelser Mining Company.

A. I think not, I could not say now whether it was previous to that or not, but I think it was afterward, though it may have been just before.

W. R. SMELSER.

C. E. FULLER is produced as a witness for F. C. Newman, administrator of the estate of C. S. Cross, deceased, and being first duly sworn deposes and says:

1 Q. You may state your name, age and residence.

A. C. E. Fuller, 45 years, Carthage, Mo.

2 Q. If you know the defendant William Martindale and knew C. S. Cross before his death, state how long after you had known them?

A. A good many years.

3 Q. Have you just listened to the original examination of the witness, W. R. Smelser?

A. Yes sir.

4 Q. Do you know the property he refers to?

A. Yes sir.

5 Q. If you ever went there to manage that property, you may state when, at whose request and for whom, and if you were interested therein, state your interest and the interest of others that were in it.

A. I took the management there about April or May, possibly a little later than that. It was along in the spring some time. It may have been in June of 1897. Part of these properties were managed by Mr. Smelser before I took charge of them, part of them he never had anything to do with. Some of the properties were
128 abandoned soon after Mr. Smelser had left the first original land and gone to Cave Springs. I took up and managed all the other properties just where he left off—in fact he and I were there together for some little time.

6 Q. Where is Cave Springs?

A. Cave Springs is a couple of miles north and probably a little east of Galena. They were sinking some shafts over there, which I had nothing to do with and had no interest in. Mr. Cross, Mr. Martindale and Mr. Smelser managed the Cave Springs property. I do not know what interest they had in Cave Springs. I had nothing to — with it. This property was a separate property from the others.

7 Q. When you went there, was the Smelzer Mining Co. still running?

A. Oh yes. It did business under the name of the Smelser Mining Co. some little time after I went there.

8 Q. State whether it finally stopped.

A. It did. Yes sir.

9 Q. If it was succeeded by any other corporation or company, what was its name and who was its manager?

A. It was succeeded by the Lomond Mining Company—I was its manager.

10 Q. State to what extent, if any, you, as the manager of the Lomond Mining Company finally succeeded took up, and utilized the claims and mining interests of the Smelser Mining Company outside of Cave Springs.

A. The property, outside of Cave Springs, the machinery and everything I took charge of just where they had left off and in fact, the machinery I think, was taken down from Cave Springs and the buildings were moved back to Galena and the Cave Springs property was abandoned.

11 Q. State who composed the Lomond Mining Company and whether it was a corporation or a partnership.

A. Mr. Cross, Mr. Martindale and myself were supposed to compose the Lomond Mining Company. It was simply a partnership—never a corporation.

13 Q. Did that partnership or not buy machinery for use in its development of the mines?

A. The machinery that was bought, after the Lomond Mining Company was organized, I think, was all bought in the name of Martindale and Cross.

14 Q. I now exhibit to you a letter, dated Dec. 31, '97 from Emporia, Kansas purporting to be written by William Martindale, directed to yourself at Galena, Kansas, you may state if that is Mr. Martindale's signature. And ask the examiner to attach a copy thereof and marked Exhibit "A" as part of witness' testimony.

A. Yes.

15 Q. And if you received that letter from him.

A. Yes.

16 Q. And I will ask you, if the paper appended to it is the copy of a contract he refers to in that letter, and if it was the copy
129 that he sent you. A copy of which is attached to witness's testimony and marked Exhibit "B."

A. So near as I could judge.

C. S. Cross, president; W. Martindale, vice-president; D. M. Davis, cashier.

First national bank, Emporia, Kansas.

Capital, $100,000. Surplus, $100,000.

(Dictated.) EMPORIA, KANSAS, *Dec.* 31*st*, 1897.

C. E. Fuller, Esq., Galena, Kansas.

DEAR SIR: I send you a copy of the Cooley contract. I have carefully compared this with the original and find it to be correct. I have some fears it is not as complete a contract as we should have had, still we will hold Mr. Cooley to make us a complete mill.

Respec'y, W. MARTINDALE.

"Exhibit A." W. N. S. examiner.

17 Q. What kind of machinery is it that is referred to there, if you received it for the enterprise at Galena, Kansas?

A. That is the contract for the concentrating plant we built there and the man whose name appears to that contract built it. Cooley built it under my management.

18 Q. About what was the cost—the total cost.

A. The total cost of this plant?

19 Q. Yes sir.

A. It was in the neighborhood of $8,000.00. There were afterwards some additions made, that I suppose ran it up in the neighborhood of $11,000.00 before we got through with it.

20 Q. How was the first cost paid for if you know?

A. The labor bill was paid for each week by check I gave to Cooley.

21 Q. Upon what bank or other institution did you draw your checks—against what person or persons?

A. I drew the checks on the Citizens' Bank of Galena, Kansas, where we kept our deposits.

22 Q. From what source did you get the money in the Citizens' Bank at Galena?

A. I got it from drafts from C. S. Cross of Emporia, Kansas.

23 Q. I now show you what purports to be your draft for $500.00 dated "Galena, Kansas, M'ch 5, 1898" drawn on C. S. Cross and ask you if that is the original draft. A copy of which is hereto attached marked Exhibit B and made a part hereof.

A. Yes sir.

130 The Citizens' Bank of Galena.

No. —. Report by this number.

Citizens' Bank of Galena.

GALENA, KANSAS, 3, 5, 1898.

At sight pay to the order of Citizens' Bank, Galena $500.00 five hundred no/100 dollars with exchange.

Value received and charge to the account of

C. E. FULLER, *Ag't.*

To C. S. Cross, Esq., Emporia, Ks.
Customers' draft.
Ex. B. W. N. S. ex.

Across face is written Paid March 8 First national bank, Emporia, Kas. Endorsed on back: Pay Union National Bank Kansas City, Mo. or order all previous endorsements guaranteed the Citizens' Bank Galena, Kansas. Jno. McCullough. Pay to the order of the bank or bankers presenting this item. Previous endorsements guaranteed Mar. 7—1898 Union national bank Kansas City, Mo. Chas. H. V. Lewis, cashier.

24 Q. And how the money was paid that got back to the Citizens' bank to remunerate it for the check you had drawn against it.

A. The proceeds of this draft were placed to our credit there in the bank.

25 Q. You may state whether this original draft represents the ordinary way in which you conducted the financial part of that business down there.

A. Yes sir.

26 Q. You may state, when the stamp there shows that the First National Bank of Emporia, Kansas paid it?

A. March 8, 1898.

(We ask the special examiner to make copy of this draft and attach to this deposition.)

27 Q. I will ask you if you now have or ever had in your possession or under your control the paper which Mr. Martindale speaks of as the Cooley contract and which he says the one sent is a carefully compared copy.

A. Mr. Cooley had the original contract himself. I have seen it a number of times, but never had any control of it.

28 Q. You may state whether or not the machinery was put up there under this contract?

A. Yes sir. All the machinery with the exception of the engines. The engines were not included in that contract. They were bought separately.

29 Q. I now show you a letter or rather a report, purporting to be made by yourself as superintendent and manager of the Lomond Mining Company dated "Galena, Kansas, Feb'y 28, 1898" and ask you if that is the original letter or report. Marked Exhibit C and made a part of witnesse's testimony.

131

A. Yes sir.

30 Q. You may now state whether or not you made all your reports of your business as superintendent down there to William Martindale?

A. No sir. I made most of them to Mr. Cross.

31 Q. Did you make a good many of them?

A. Oh yes. During the latter part of my stay down there, the greater part of the reports were made to Mr. Martindale.

32 Q. What was the date of your last stay there?

A. I think it was about April 1, '98.

33 Q. How many times, if at all, was William Martindale, defendant, down there to see those properties while you were there for him and Cross.

A. A great many times—I could not tell you the number of times.

34 Q. State which of the two defendants—Martindale or C. S. Cross gave directions and really managed and passed upon matters, aside from your superintendency.

A. Well either of them, as they happened to be there. Mr. Martindale perhaps, had more to say about it that Mr. Cross, for I think he was there probably more often, during the construction of the mill than Mr. Cross. They gave the directions as they would be there, either of them.

35 Q. Did one more than the other give the directions about the machinery.

A. Well I don't know. As I stated before, when they would be there from time to time I would discuss the matters, that came up with who happened to be there, whether it was Martindale or Cross. There was really no special directions from one more than the other. I gave most of the directions myself.

36 Q. In the latter part of your stay down there, which of the two Cross or Martindale—visited you most frequently?

A. Well I rather think Mr. Martindale was there more than Mr. Cross.

37 Q. I exhibit to you now five shipment bills or freight bills made out to Martindale and Cross to Galena station and ask you to look at them and say whether they covered machinery that was shipped to Galena and whether it was put in there for the management of those properties?

A. Yes sir.

38 Q. If you know how the freight on these bills were paid, state it?

A. I paid the freight on these bills by check.

39 Q. For whom?

A. For the Lomond Mining Co.

40 Q. Have I rightly understood you that the Lomond Mining Company consisted entirely of Mr. Martindale, C. S. Cross and yourself?

A. So far as I know.

132 41 Q. If you can, please approximate the amount of money that you disbursed down there in the management of those properties?

A. Why several thousand dollars. I cannot give the exact amount.

42 Q. Did you get it all by checks and drafts as heretofore explained or was some of it remitted from Emporia to you or personally handed to you by Mr. Cross or Mr. Martindale.

A. I think Mr. Martindale gave me his personal check once and maybe twice.

43 Q. The rest of it how?

A. I got the rest by draft from C. S. Cross.

44 Q. Drawn on Cross?

A. Yes sir.

45 Q. You may state whether the money that you received on the one or two checks from Martindale and on these drafts, as you have explained was all used for the business of the Lomond Mining Company or was it used in other ways?

A. All used for the business of the Lomond Mining Company. It was all deposited in the bank and checked out down there.

46 Q. I understand you to say that "Exhibit A" is the copy of the contract that Martindale speaks of as attached to this letter here.

A. Yes sir.

(We now offer letter and contract in evidence, marked "Exhibit A.")

Cross-examination.

By E. W. CUNNINGHAM:

1 Q. I understand you to say that you were down there in the mining regions on behalf and managing the property for the Lomond Mining Company.

A. Yes sir.

2 Q. That you got your money to pay the bills made in the running of their business there for the Lomond Mining Company by drawing drafts on C. S. Cross, of Emporia?

A. Yes sir.

3 Q. You expended somewhere between $30,000.00 and $40,000.00?

A. I cannot say as to the exact amount—about thirty-odd thousand dollars, I should think.

4 Q. At what time and for how much did William Martindale ever give you any checks of his own for that purpose.

A. Never but for small amounts. I think once and possibly twice, if I remember correctly. One check was for $200.00 or $300.00.

5 Q. Do you now testify that any money that William Martindale ever gave to you was for the purpose, to his knowledge, of paying any of the bills of the Lomond Mining Company.

133 A. He never gave it to me for other purpose, I think.

6 Q. Can you state whether or not he ever gave you any money, for the purpose of paying any of the bills of the Lomond Mining Company?

A. Yes. He did.

7 Q. When?

A. I cannot tell the exact time.

8 Q. About when?

A. Well, I could not tell you.

9 Q. Can't you come within a year of it?

A. Yes sir. Some time during the year of 1897.

10 Q. Where was it?

A. I think he gave me one check, while at Galena, I am not sure. He sent me one from Emporia.

11 Q. Can you fix the time any nearer than you have done?

A. No, I cannot.

12 Q. Referring to the contract which has been introduced in evidence, have you ever seen the original of it?

A. I have seen the one Mr. Cooley had. Yes.

13 Q. Don't you know that that contract was signed by Mr. Cross?

A. No I don't remember that it was, but it must have been.

14 Q. I now exhibit to you the original of that contract and ask you to look at the signature thereto of Martindale & Cross and tell me who wrote that signature.

A. I should think Mr. Cross wrote it.

15 Q. Don't you know that he did?

A. It looks very much like his writing. Yes sir. I would say he wrote it, though somebody else may have written it.

C. E. FULLER.

Specifications.

Specifications for a complete ore-dressing plant, as per specifications hereunto attached.

There shall be one main jig-room 24 x 40 feet with walls 16 feet high, posts and sills to be 6 x 8. Girts to be 8 x 8 trussed and braced by 6 x 6; building to be boxed with No. 1 boxing, batted with 1 x 4 bats & roofed with Starr A Starr shingles. Said shingles to be laid 4½ inches to the weather. Rafters to be 2 x 7, placed 2 feet from centers. Roof ⅓ pitch. All lumber named in this contract to be No. 1.

There shall be one engine-room 36 x 20 feet. 12-foot wall, enclosed same as jig-room, frames to be bal-oon frames, sills and plates to be 2 x 8 studding 2 x 6. Nail girts 2 x 6 studding to be 5 feet from centers. There shall be one crusher-house 20 x 24 feet, covering platform, which shall rest on heavy bent work, made of 8 x 8 timbers. Joists to be 2 x 12, 16 inches centers and to be floored with 2 inches white-oak flooring. There shall be one rod grisley
134 4 feet x 10, rods to be 1⅛ inches in diameter 4 inches apart, all posts in jig-room shall rest on stone piers 2 feet square, made of limestone and hydraulic cement.

There shall be one 15-inch Blake crusher of the latest pattern erected in heavy bent work, 10 x 10 timbers, securely anchored to dead-men three feet in the ground in concrete mortar. Two sets of 14 x 22 inch cornish rolls, mounted (one) heavy frame-work of 8 x 10 timbers, securely rodded and braced. There shall be also one set chat rolls 12 x 16 inches. Frame 8 x 8 material, securely braced and rodded. All rolls to be set on concrete foundation. All concrete to be made out of limestone. In front of (*chursher*) shall be placed a suitable rod grisley to accommodate crusher.

Screens.—There shall be two revolving screens; one immediately after the crusher 3 feet in diameter and 3 feet long and one screen between main elevator and roughing jig 3 feet in diameter and 6 feet long, each covered with heavy No. 8 steel jackets. The roughing jig shall be of four sections, sections to be 30 x 42 and to be of Cooley's latest design, self-contained jig. The finishing jog shall be of same design, having five sections, sections 24 x 36.

Elevators.—The main screen elevator shall be 24 feet high and carry 14-inch six-ply belt, also 14-inch heavy steel cups, placed 20 inches apart. The tailing elevator shall be 40 feet high and closed with same sized belt and cups. The Smitten elevator shall be 12 feet high and carry 12-inch six-ply belt with 12-inch steel cups, 20 inch apart.

Shafting.—There shall be one main line shafting in mill 40 feet long $3\frac{7}{16}$ inches in diameter, revolving in heavy babbitted journal boxes. All elevator shafting shall be $2\frac{7}{16}$ inches in diameter, re-

volving in heavy babbitted journal boxes. All shafting to be of cold rolled steel. All pulleys on line shafting to be wood-split pulleys and all pulleys in elevator to be extra heavy cast iron turned and faced as hereinafter mentioned. There shall be one jack elevator of sufficient height to convey the ore from elevator to ore bin.

Pulleys.—Power pulleys to be of sufficient size to correspond with engine pulley, to be 14-inch faced. Crusher pulley 48 x 10 inches, two rolls pulleys 36 x 10 inches one roll pulley 30 x 8 inches. Centrifugal pump pulley 40 x 8 inches, two elevators driven pulleys 36 x 8, two 36 x 6 four 10 x 10. Screen pulleys, one 24 x 6, one 16 x 6, jig pulleys three 20 x 8, three 16 x 8 iron pulleys and elevators three 30 x 14 three 20 x 14, one 20 x 8 one 16 x 8. There shall be
135 installed one 3-inch centrifugal pump with suction pipe to well, to be located not more than 12 feet from pump discharge to mill supply tank. This tank shall be erected on heavy bent work of suitable height where the water can grow by gravity to the various machines in the mill through pipes controlled by valves.

Belting.—All belting in the mill shall be genuine Boston belting and to be six ply, except centrifugal pump belt and three elevator driven belts, which shall be four ply. Tailing elevator, screen elevator, and main drive belt to be 14 inches wide. Crusher belt and two roll belts shall be ten inches wide. Jig belts, centrifugal pump belts and tailing elevator driven belt shall be 8 inches wide. All screen belts and inside drive elevator blets shall be 6 inches wide.

Spouting.—Spouting in mill shall be neatly done and lined with heavy No. 8 steel and cast iron spouting. All of the mill, interior and exterior except shingle roof shall be painted with one good coat of mineral paint.

All work shall be done in a good workmanlike manner.

(Signed) GEO. T. COOLEY.
MARTINDALE & CROSS.

JOPLIN, MISSOURI, *Oct. 29th*, 1897.

Lomond Mining Company, Galena, Kansas.

GENTLEMEN: I propose to furnish and erect one ore-dressing plant as per specifications hereto attached and guarantee the same to properly handle 60 to 70 tons of ore every ten hours for the sum of $3775.00 terms to be agreed upon. I am prepared to begin the construction at once and finish without delay, barring unavoidable accidents. Mill to be generally the latest and most approved designs. All material and workmanship to be of the best.

Respectfully submitted.

GEO. T. COOLEY.
MARTINDALE AND CROSS.

Labor and freight to be paid on delivery. Balance to be paid for within 30 days after successful operation of plant.

Sufficient doors and windows to furnish ample light and easy access to all parts of the building.

GEO. T. COOLEY.

"Exhibit B."

Office of Lomond Mining Company,

C. E. Fuller, superintendent and manager.

GALENA, KANSAS, 2/28, 1898.

Wm. Martindale, Esq.

DEAR SIR: Everything is about the same as when I wrote you Saturday. The ground is looking better and looks like we might have a good prospect again. We are getting some fine stuff, and the Sparks shaft is looking good. They are getting along fine with the jiggs and will get everything finished this week, so next week we ought to make a lot of ore, and I feel sure we will do it. We will dead sure save what stuff we do run—Cooley was over again Saturday eve and I told him Mr. Cross was very busy with his sale &c. Williamson & R. filed their lien today. I think Cooley has posted them all. I do not think he expects to get anything out of it himself &c. Going to make all the trouble he can, will write you every day and try and keep you posted.

Yours truly,

C. E. FULLER.

Exhibit "C."

136 I do hereby certify that by consent and request of the parties first above named, the taking of the foregoing depositions was continued by me from time to time, and that I took portions of said testimony at the following-named dates, to wit, June 23rd, 1899, June 24th, 25th, 26th, 27th, and 28th, 1899, and July 7th and 8th, 1899 and concluded the same on February 3rd, A. D. 1900.

I further certify that the foregoing depositions of S. Nation C. V. Eskridge, Thomas Evans, H. C. Whitley, F. C. Newman, H. P. Clark, J. M. Johnson, C. S. Jobes, John Henning, George Plumb, C. W. Johnson, John Stotler W. R. Smelser, and C. E. Fuller, were, when taken then and there reduced to writing by me, in the presence of the said deponents, and by them respectively subscribed in my presence after having been so reduced to writing.

I further certify that I am not of counsel nor attorney to either of the parties in this suit nor interested in the event of this cause.

I further certify that, it being impracticable for me to deliver said depositions with my own hands to the court for which they were taken, I have retained the same, for the purpose of being sealed up by me, and speedily and safely transmitted by the United States mail to the said court, for which they were taken, and to remain under my seal until there opened.

Given under my hand at the city of Emporia, in the said district of Kansas, this 16th day of March A. D. 1900.

W. N. SMELSER,
Special Examiner, as Aforesaid.

Indorsed: No. 7681. Filed Mar. 17, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court for the District of Kansas.

FOURTH NATIONAL BANK OF ST. LOUIS, Plaintiff,
vs.
MORTON ALBAUGH ET AL., Defendants.
No. 7681. Order.

The case is dismissed as to the defendant Harvey.

Thereupon leave is granted to F. Harvey to file a petition of intervention herein, whereupon said intervening petition was filed.

JOHN A. WILLIAMS, *Judge.*

March 21, 1900.

Indorsed: No. 7681. Fourth National Bank *vs.* Albaugh *et al.* Order. Filed M'ch 21, 1900. Geo. F. Sharitt, clerk.

In the United States Circuit Court for the District of Kansas, First Division.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, Kansas, *et al.*, Defendants.
No. 7681.

Intervening Petition of F. Harvey.

F. Harvey, by leave of court, files this his petition of intervention, and thereupon avers and complains:

1. Heretofore complainant instituted a suit in equity as above entitled against the defendants, in which said suit it afterwards filed an amended bill of complaint, wherein and whereby, after making the necessary allegations giving the court jurisdiction of the case, it was substantially alleged as follows:

137 That C. S. Cross died on November 16th, 1898, being at the time president of the First National Bank of Emporia, Kansas, and possessed in his own name of a large amount of personal property, described in said bill of complaint, and that afterwards defendant F. C. Newman was duly appointed and qualified as administrator of his estate. That after said Cross' death Morton Albaugh became in due and regular form the lawful receiver of the said The First National Bank of Emporia, Kansas.

That prior to the death of said Cross, to wit, on June 15th, 1898, said complainant held two valid and subsisting notes aggregating twenty thousand dollars ($20,000.00) described in said bill of complaint, executed and endorsed, in the manner described therein, by said Cross and the defendant William Martindale, which said notes, by agreement between said Martindale and Cross, were as to them the obligations of said Cross, and, as between them, to said notes said Martindale bore to said Cross the relation of surety; that said notes were renewed from time to time as alleged in said bill of complaint, and that complain-t held the last renewals thereof at the time

of the death of said Cross, executed and endorsed as alleged in said bill of complaint, and wholly unpaid.

That on July 18th, 1898, said Cross, for the purpose of securing said Martindale from liability on account of said notes, and the payment thereof by him, the said Cross, did make, execute and deliver to the said Martindale a transfer and bill of sale of all the property described in the bill of complaint, a copy of which bill of sale was attached thereto as "Exhibit C;" and that for the same purpose and to further secure said Martindale said Cross made, on November 15th, 1898, executed and delivered to him another bill of sale of said property, a copy of which was likewise attached to the bill of complaint, marked "Exhibit D."

That immediately after the death of said Cross, to wit, on November 16th, 1898, said Martindale took possession of all said property but that thereafter one C. S. Jobes, the first receiver of the said The First National Bank of Emporia, Kansas, to succeed whom the said Morton Albaugh was appointed, wrongfully and without the knowledge or consent of said Martindale, took possession thereof; and that thereupon the said Jobes as such receiver, said Newman as such administrator, the said Martindale and others interested therein, for the purpose of saving costs and expenses, entered into an agreement whereby all of said property should be sold and the proceeds thereof held in place thereof subject to the rights of the respective parties, a copy of which agreement was attached to the said bill of complaint; and that in pursuance thereof the property had been sold, and the proceeds arising therefrom, amounting to fifty-five thousand dollars ($55,000.00) had been deposited and held as in said agreement, provided.

That said complainant, and all other parties holding paper executed by said Cross and Martindale, and which, under said agreement between them, were the obligations of Cross and to be paid by him, were and are entitled to be subrogated to the rights of said Martindale to and in said property and the proceeds thereof;
138 that complainant, and the defendants therein, The First National Bank of New York, Ford Harvey and H. C. Whitley, were and are creditors of said Cross included in said agreement, and were and are entitled to participate and share in said fund, but in what shares or amounts the complainant did not know; and that aside from said fund said Cross left no estate.

That neither said Albaugh, nor his predecessor Jobes, had been nor was entitled to any right, share or interest in said fund; and that said Newman, as administrator, was entitled to only so much thereof as might remain after the claims of the other parties mentioned should be satisfied and paid.

That in view of the premises the complainant prayed for the usual process and so forth, and that upon a hearing of the case an account be taken of what was due the complainant, and each and all others who were entitled to share in said fund, and that distribution thereof be made in accordance with right and equity; and that complainant have judgment against said Martindale for twenty thousand dollars ($20,000.00) with interest.

Afterwards said cause was dismissed as to said Harvey, no process having been sued out as against him.

2. Intervener owns and holds a promissory note dated July 30th, 1898, wherein and whereby said C. S. Cross promised to pay to the order of F. Harvey, six months after date, the sum of ten thousand dollars ($10,000.00) for value received, with interest from date at the rate of seven per cent. per annum; that said note has endorsed upon the back thereof the name of said Martindale, which endorsement was so made before the delivery of said note to this intervener; that said note was by agreement between said Cross and Martindale the obligation of said Cross and said Cross agreed expressly with said Martindale that he would pay the same and hold him harmless on account thereof; that said note is now due, and wholly unpaid; that a copy thereof is attached hereto, marked "Exhibit A" and made a part hereof.

3. That the matters and things alleged in said bill of complaint and cross-bill of the 1st National Bank of New York are all, each and every one of them, true as alleged, as this intervener is informed and believes, and which this intervener accordingly charges on information and belief to be true.

4. That intervener's note aforesaid was intended by said Cross to be secured by the bills of sale aforesaid, by them both and each of them, and that intervener is entitled to share in said fund,
139 and in the *pro rata* distribution thereof among the parties entitled thereto.

Wherefore the intervener prays that the proceeds arising form the sale of the property aforesaid be adjudged and decreed to be a fund set aside and appropriated for the payment of the notes of the intervener, and all other persons who may prove themselves to come within the terms of the agreement aforesaid between said Cross and Martindale; that an accounting be taken to ascertain the amounts respectively due on all said notes, and that distribution of said fund be then made among the holders thereof, share and share alike, and for such other relief as the court may determine to be right and proper in the premises. An answer under oath is waived.

FRANK HAGERMAN,
Solicitor for Intervener.

WILLARD P. HALL, *Of Counsel.*

EXHIBIT "A."

"$10,000.00. EMPORIA, KAS., *July* 30, 1898.

Six months after date I promise to pay to the order of F. Harvey at Union national bank, Kansas City, Mo., ten thousand dollars, for value received with interest from date at the rate of 7 per cent. per annum. Interest payable ——.

C. S. CROSS."

Written on back: "W. Martindale."

Indorsed: No. 7681. In the United States circuit court for the district of Kansas, first division. The Fourth National Bank of St.

Louis, complainant, *vs.* Morton Albaugh, receiver of the First National Bank of Emporia, Kansas *et al.*, defendants. Filed M'ch 21, 1900. Geo. F. Sharitt, cl'k. Intervening petition of F. Harvey.

In the United States Circuit Court for the District of Kansas, First Division.

THE FOURTH NATIONAL BANK OF ST. Louis, Complainant, *vs.* MORTON ALBAUGH, Receiver of the First National Bank of Emporia, *et al.*, Defendants. } No. 7681. Stipulation.

It is agreed that the answer of Morton Albaugh, receiver, may be filed this March 21st, 1900, with the understanding that each allegation thereof is by each of the other parties to this cause specifically denied, without the necessity upon the part of such parties to file formal pleadings so denying.

FRANK HAGERMAN,
Attorney for Ford Harvey.
CUNNINGHAM & HAMER,
Att'ys for Fourth Nat. Bank of St. Louis.
E. W. CUNNINGHAM,
Att'y for First Nat. Bank of N. Y.
LAMBERT AND HUGGINS,
Att'ys for Morton Albaugh, Receiver.
BUCK & SPENCER,
Attorneys for F. C. Newman, Administrator.

Indorsed: No. 7681. Stipulation. Filed March 21, 1900. Geo. F. Sharitt, clerk.

140 In the U. S. Circuit Court for District of Kansas.

THE FOURTH NATIONAL BANK *vs.* MORTON ALBAUGH ET AL. } 7681.

Stipulation.

The parties admit that C. S. Cross borrowed of intervener Harvey ten thousand dollars and executed therefor the note a copy of which is set forth in the intervening petition of said Harvey which note with interest is wholly unpaid.

Wm. Martindale endorsed said note before its delivery and he did so merely for the accommodation of and as surety for Cross upon the demand of Harvey for a surety and Harvey had no knowledge of the disposition of the proceeds of the note.

J. JAY BUCK, *For Administrator.*
LAMBERT & HUGGINS,
Att'ys for Morton Albaugh, Receiver.
F. HAGERMAN, *For Intervener.*
E. W. CUNNINGHAM,
For Complainant and Cross-Comp.

Indorsed: No. 7681. Fourth National Bank *v.* Albaugh *et al.* Stipulation as to Harvey's intervention. Filed M'ch 21, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver, etc., *et al.*, Defendants. } No. 7681.

Stipulation.

It is stipulated and agreed that the following are facts, and to the extent that may be deemed relevant and material may be used as evidence in this suit by either party, viz:

On June 17th, 1898, one H. L. Leibfried brought suit in the district court of Lyon county, State of Kansas, against said C. S. Cross for an accounting in partnership, and for the recovery of $35,000, together with one-half interest in all live stock, machinery and farm implements on said "Sunny Slope" ranch, and for the cancellation of a large amount of promissory notes alleged to have been executed by said Leibfried, including two notes of $20,000.00 each, and asking for the appointment of a receiver and for injunction.

On July 1st, 1898, said court denying a receiver decided to grant an injunction unless said Cross would give bond conditioned to pay any judgment said Leibfried might recover. On that day Cross executed such bond with said William Martindale and H. C. Whitley as sureties, and the bond was approved by the judge of said court.

On October 14th, 1898, the jury in said case returned a verdict in favor of Cross and against Leibfried, and on same day Leibfried filed motion for new trial, the consideration of which was continued until January 2nd, 1899, when the court overruled said motion.

141 The cause was then continued for the purpose of revivor against F. C. Newman, administrator, and finally on October 30th, 1899, said suit was dismissed.

On November 26th, 1898, said F. C. Newman was appointed administrator of the estate of said Cross.

The stipulation attached to the amended bill of complaint, marked Exhibit "E," was signed November 26th, 1898.

CUNNINGHAM & HAMER,
Solicitors for Complainant and 1st N. Bk. of N. Y.
BUCK & SPENCER,
Att'ys for F. C. Newman, Adm'r, etc.

Indorsed: No. 7681. In the circuit court of the United States for the district of Kansas. Fourth National Bank, etc., plaintiff, *vs.* Morton Albaugh, receiver, etc., *et al.*, defendants. Stipulation. Filed March 21, 1900. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA,
District of Kansas.

In the Circuit Court in and for said District.

THE FOURTH NATIONAL BANK OF ST. Louis, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.

No. 7681. In Chancery.

The answer of Morton Albaugh, receiver of the First National Bank of Emporia, Kansas, one of the defendants, to the amended bill of complaint of The Fourth National Bank of St. Louis, complainant.

This defendant, saving and reserving to himself, now, all manner of benefit and advantage of exception, which can or may now or at any time hereafter be had or taken to the said complainant's said amended bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material for him to make answer thereto, answers and says:

That he admits the corporate existence of the Fourth National Bank of St. Louis, the First National Bank of Emporia, Kansas, the First National Bank of New York, the appointment of C. S.
142 Jobes as receiver of the First National Bank of Emporia, Kansas, and that this answering defendant is the successor in office of the said C. S. Jobes, as alleged in said amended bill of complaint.

This answering defendant further admits and alleges that said C. S. Cross, at the time of his death, was sole owner of the personal property mentioned, described and referred to in said amended bill of complaint relieved of all charges, claims and liens save only one certain so-called bill of sale, to W. Martindale, as trustee, which was in legal effect a chattel mortgage from said C. S. Cross to said First National Bank of Emporia, Kansas; that just prior to March 4th, 1898, the said C. S. Cross being the owner of the said personal property and being in need of a large sum of money for his use in the management of a large pure-bred Hereford cattle business located upon Sunny Slope farm in Lyon county, Kansas, and being compelled to have a large amount of ready money to enable him to avoid sacrificing said personal property and being president of said First National Bank of Emporia, Kansas, appealed to said defendant, W. Martindale, who was at that time and ever since has been, a director, the vice-president of and a member of the discount board of said First National Bank of Emporia, Kansas, for a large sum of money from the funds of said bank to be used by him in his said

Hereford cattle business and did procure from said bank through said Martindale in his said several official relations, the sum of at least $40,000 which he used for his own private business. And as a part of one and the same transaction the said C. S. Cross executed and delivered to said Martindale as trustee for said bank to secure the payment of the money then sought, received and so used, and to secure any other indebtedness then due and owing from said Cross to said bank, a bill of sale or chattel mortgage pledging to said bank through said Martindale as such trustee all the property in controversy in this suit. A copy of said bill of sale or chattel mortgage is hereto attached made a part hereof and marked Exhibit "A" and said Martindale then and there duly received said bill of sale or chattel mortgage and then and there accepted the trust therein imposed, and at no time during the life of said C. S. Cross did said Martindale renounce or repudiate said trust.

And this answering defendant further says that at the time of the execution and delivery of the said bill of sale or chattel mortgage to W. Martindale as trustee for said bank as above stated, the said C. S. Cross was indebted to said bank in a sum far exceeding the value of said property; that said indebtedness was then due
143 and that said bill of sale or chattel mortgage was given by the said Cross for the purpose of securing the same and for the further purpose of securing the sum then borrowed to the amount of $40,000 as above stated, making a total indebtedness secured thereby of nearly $300,000; that all of said indebtedness from said Cross was well known to said Martindale and that said Martindale, by reason of said facts could not legally receive or accept for himself or for any other person or persons any further conveyances or assurances of said property; because of said facts the said Martindale could not legally receive or take the bills of sale set forth in complainant's amended bill of complaint, and that the same are absolutely void as against the claim of this defendant as set forth herein.

This answering defendant further says that said First National Bank of Emporia, Kansas, had long been totally insolvent, which fact, during all the times it was a fact, was well known to both said Cross and to said Martindale; and that said bank was closed by order of the Comptroller of the Currency as stated in said amended bill of complaint and because said Cross had successfully wrecked the same, he committed suicide November 16th, 1898.

That immediately after the death of said Cross said C. S. Jobes as receiver, took exclusive control and possession of all the property involved in this suit and at the expense of said bank, cared for the same and duly sold all said property and deposited the proceeds thereof in the Emporia national bank to the credit of himself and said defendant F. C. Newman, administrator, under and by virtue of the stipulation set out in said amended bill of complaint; that on January 2nd, 1900, this answering defendant, for the first time learned of the principal facts above affirmatively pleaded with regard to the bill of sale above pleaded as Exhibit "A," and avers because of the facts herein that as receiver of said bank he is entitled to the

entire proceeds of said property; that the personal property so pledged as aforesaid and referred to in Exhibit "A" aforesaid, was all the property said C. S. Cross owned except such as was exempt from forced sale on execution and that fact was well known to said Martindale when as vice-president of said bank he made the aforesaid loans and gave the aforesaid credits to said Cross for said bank; that the action of said Cross in the premises in the making of said instrument, Exhibit "A" and the action of said Martindale in accepting said trust and giving said credits and extensions of time was, as between them, only and solely intended as a security for the said First National Bank of Emporia, Kansas.

144 This answering defendant craves leave of the court, if the same shall be deemed necessary, to file herein proper cross-petition.

The premises considered, this defendant prays that said complainant's amended bill of complaint be dismissed, that this defendant be decreed the proper custodian and under his trust as receiver, the owner of the funds in litigation, and he asks for all other relief which the court may deem proper to grant.

LAMBERT & HUGGINS,
Attorneys for Answering Defendant, Morton Albaugh, Receiver of the First National Bank of Emporia, Kansas.

UNITED STATES OF AMERICA,
District and State of Kansas, County of Lyon, } ss:

Morton Albaugh, being duly sworn, deposes and says that he is receiver as aforesaid and is the defendant above named; that he has heard read the foregoing answer and that the same is true as he verily believes.

MORTON ALBAUGH.

Subscribed and sworn to before me this 3 day of M'ch, 1900.
My commission expires Oct. 4, 1901.
[SEAL.]

ANNA E. SPECK,
Notary Public.

Copy.

Bill of Sale of Personal Property.

Know all men by these presents, that in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz: all of my personal property of every kind and description and *what*ever located with the exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon county, Kansas.

To have and to hold, all and singular, the said goods and chattels, forever; and the said grantor hereby covenant- with the said grantee that he is the lawful owner of the said goods and chattels; that

they are free from all incumbrances; that he ha- good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

145 In witness whereof, the said grantor has hereunto set his hand this 4th day of March A. D. 1898.

C. S. CROSS.

Executed in presence of

——— ———.

Exhibit A.

I-dorsed: No. 7681. Fourth Nat. Bank of St. Louis *vs.* Morton Albaugh, rec., *et al.* Answer of Morton Albaugh, receiver. Filed M'ch 21, 1900. Geo. F. Sharitt, clerk. We hereby consent that the within answer may be filed out of time. Dated 3/3, 1900. Cunningham & Hamer, att'ys for complainant. E. W. Cunningham, att'y for def., First National Bank of N. Y.

Mr. G. W. MARTINDALE called as a witness by complainant being duly sworn to testify the truth, the whole truth and nothing but the truth, testifies as follows:

Direct examination.

By E. W. CUNNINGHAM:

1 Q. What is your full name?

A. George William Martindale.

2 Q. Mr. Martindale, did you know C. S. Cross in his lifetime?

A. I did.

3 Q. State what position he occupied relative to the First National Bank of Emporia?

A. He was president.

4 Q. State whether or not you as W. Martindale with C. S. Cross are the parties who endorsed the notes mentioned in plaintiff's bill of complaint, of which I hand you the original, now held by the Fourth National Bank of St. Louis?

A. Yes, that is Mr. Cross's signature and mine.

5 Q. State whether or not you with him executed the thirty-thousand-dollar note mentioned in the cross-complaint, of the First National Bank of New York, the original of which I hand yon?

A. I had a note of that size; this is Mr. Cross's signature.

6 Q. I will ask you whether or not you have in your possession the original of an instrument mentioned as a bill of sale in the complaint dated July 15th, 1898?

A. Mr. Kellogg, my attorney has it.

7 Q. Is that the paper that you now hold in your hand?

A. Well, it has every appearance of it.

8 Q. Do you know the signature of C. S. Cross?

A. Yes.

9 Q. State whether or not that instrument is signed by C. S. Cross?

A. It is.

10 Q. State when that instrument first came into your possession?

146 A. I am not absolutely sure what date, but my best recollection of the 15th of July.

11 Q. What year?

A. Year of 1898.

12 Q. The date of its execution?

A. Yes sir.

13 Q. You may state now the circumstances under which that was made and delivered to you?

Question objected to as incompetent. Objection overruled.

14 Q. Now state the circumstances that led up to this and all of the surrounding circumstances of the giving of this bill of sale?

A. Mr. Cross, in the suit pending in the Lyon county court was compelled to give a bond.

15 Q. Please look at this paper and tell the court whether or not that is the bond.

A. Yes, that is the bond or similar to it.

16 Q. Is that your signature?

A. Yes, that is my signature and Mr. Cross's signature.

(Exhibit "A" here offered in evidence.)

He asked me who would go on his bond and I said I would. He said I wish (—) would call Col. Whitley over. I telephoned him and called him over and said Mr. Cross has to give a bond in a suit and we want you to sign it. We both signed it then. Some time after that, I don't remember just how long, Col. Whitley came in the bank and said, "That is a pretty large bond *with* signed for Mr. Cross the other day; it is perfectly safe, is it?" I said, "I think so." Mr. Cross was away at the time. When he came home I said, "Col. Whitley is a little bit worried about that bond," and he said, "I think I ought to give you and Col. Whitley a bill of sale or mortgage to protect you and protect you for the paper you have endorsed for me." I don't know whether it was a bill of sale or mortgage he said. And he wrote the bill of sale or mortgage, whatever you call it.

17 Q. I will ask you what you did with it?

A. Well, in the first place I took it over to the hotel and was going to show it to Col. Whitley, but he wasn't in at the time, and I took it to my house and it remained there until after Mr. Cross's death.

(*17* Q.) Has it been in your possession ever since he gave it to you?

A. After Mr. Cross's death I gave it to my attorney.

It is here admitted that none of the steps required under the statute of Kansas in matters of general assignment was taken by any of the parties to this instrument.

147 18 Q. I will ask you what was there at that time, Mr. Martindale, that you and Mr. Cross were jointly indebted upon; what paper was there out, held by any one?

A. $30,000.00 in First National Bank New York, and $20,000.00 Fourth National St. Louis.

19 Q. Now, I will ask you whether or not you have in your possession a paper a copy of which is attached to the bill of complaint and marked "Exhibit D" and dated Nov. 15th, 1898?

A. Yes sir.

20 Q. Do you hold that paper in your hand?

A. I do.

21 Q. Is that signed by C. S. Cross?

A. Yes.

22 Q. You may state the circumstances that surround the giving of that paper?

A. Mr. Cross came to my house on that day, at the time Mr. Jobes was there, and we did not know whether the bank would be closed or not; I didn't know how much paper I was on with Mr. Cross, and I said to him, "How much paper am I on with you?" He said that of New York, St. Louis and the Kansas City notes. (That is the Harvey note, and I was also security for the Union national for $10,000.00 there.) He went right into the other room where my desk was, and he remarked, "Can I use your desk a minute?" I said, "Yes." He wrote this instrument and came out and handed it to me. That is about the sum and substance of it.

23 Q. Have you had that in your possession ever since?

A. Yes.

(—) Q. Was there any notices sent out to the creditors by you, Mr. Martindale, as assignee?

A. No sir.

25 Q. Any inventory taken of the property conveyed in the bill?

A. No sir.

26 Q. Did you ever qualify as assignee?

A. No sir.

27 Q. Give any bond?

A. No sir.

28 Q. Any proceedings taken in the district court provided under the statute for assignment to creditors?

A. No sir.

29 Q. At the time of giving either of these papers was there anything said by you or Mr. Cross as to securing other creditors besides those you were endorsing with him?

A. No sir.

30 Q. Was it for anybody else?

A. No sir.

31 Q. Were you interested in these notes which you have spoken of as being secured by these instruments in any way aside from being a joint maker thereon with Mr. Cross and an endorser on them with Mr. Cross?

A. I had no personal interest in them at all, only as an endorser.

It is admitted that the liability on the bond in the Leibfried *vs.* Cross case might have been $75000.00 but it is also admitted
148 that the liability upon said bond has ceased since the giving of the bills of sale.

Cross-examination.

By I. E. LAMBERT:

32 Q. Mr. Martindale, at the time of giving of this bill of sale on July 15th, 1898, that was taken primarily to secure you and Col. Whitley for going upon that bond which has been introduced in evidence?

A. Yes.

33 Q. And that was the talk with reference to it?

A. Well, he spoke about securing Col. Whitley on the bond and paper I had endorsed for him.

34 Q. Were the amounts of the debts of yourself or Mr. Cross spoken of at that time?

A. That is that I owed?

35 Q. Yes, or that he owed outside of these that you mention?

A. No, that is all.

36 Q. The amount at that time was to the First National Bank — New York $30000.00 and to the Fourth National Bank — St. Louis $20,000.00?

A. That is my recollection.

37 Q. Now, Mr. Martindale, at the time of taking that bill of sale both yourself and Mr. Cross as a matter of fact, were insolvent, weren't you?

A. I would not admit that; I did not believe it. It turns out now that I was; both were insolvent.

38 Q. Now, Mr. Martindale, approximately do you know how much you owed the bank individually at that time, at the time of taking this bill of sale?

A. I did not consider I owed it anything.

39 Q. Well, as it has since turned out?

A. As it has since turned out, I think the award was $113,000.00 but $37,000.00 of that was stockholders' liability in the First national.

40 Q. Now, that $113,000.00 that we agreed upon, Mr. Martindale, as the amount of the award, was in favor of the receiver as against yourself?

A. That is my understanding.

41 Q. Now, what other indebtedness did you have outside of any indebtedness to the bank, that is any creditors outside of these you have named for which you were liable with Mr. Cross?

A. This New York and St. Louis and Kansas City matter that I have already testified to; I don't recollect any others now.

42 Q. Now, do you know approximately as it has since turned out what amount of indebtedness of Mr. Cross was to the bank?

A. I do not.

43 Q. Now, I will ask you, this further question, did you know that he was indebted to the bank at that time in any amount?

A. At that time?

149 44 Q. Yes.

A. He had told me several times along in the spring and summer that he didn't owe the bank anything.

45 Q. Now, you, as one of the officers of the bank, didn't you know approximately of the amount of his indebtedness to the bank, at that time, or the fact that he was indebted to the bank at the time of taking this bill of sale?

A. No sir, I perhaps ought to explain that I never paid any attention to the bank books at all; depended upon somebody else.

46 Q. Now you were vice-president and Cross was president and your son Howard was one of the directors of the bank; now, didn't you three form the discount board of the bank?

A. No sir, not that I knew of. I didn't know there was such a thing until after the bank failed.

47 Q. Now, you knew Mr. Cross was a member of the discount board?

A. The facts are I did not know there was a discount board appointed.

48 Q. Now, Mr. Martindale, this bill of sale of November 15th, your indebtedness at that time to the bank was approximately what it was at this other time?

A. I suppose so.

49 Q. And did you know whether Mr. Cross was indebted in any amount to the bank at the time of taking this bill of sale in November?

A. I did not suppose he was.

50 Q. Now, did you make any investigation at all?

A. I did not.

51 Q. Now, this last bill of sale does not mention any names of any persons as beneficiaries?

A. That is my recollection about it.

52 Q. Now, you stated that you asked Mr. Cross what you were liable on?

A. I asked Mr. Cross "How much paper am I on with you?"

53 Q. And what was his answer?

A. That in New York, St. Louis and Kansas City.

54 Q. Well, then what was done or said?

A. He said, "Can I use your desk a minute?" I said, "Yes." He went in and wrote a bill of sale and came out and gave it to me.

55 Q. That is the last bill of sale?

A. On the 15th of November.

56 Q. Now didn't you have a list of the debts at that time, Mr. Martindale, a list of Mr. Cross's debts at the time you took this last bill of sale?

A. Only what I speak of, in New York, St. Louis and Kansas City.

150 57 Q. Didn't you have a list of the debts that were owned by the bank and held by the bank?

A. No sir.

58 Q. Didn't you a few days after Mr. Cross's death speak of a list you had, to Mrs. Cross?

A. I did not.

59 Q. Did you examine them in the bank to see if there was any?

A. I did not.

60 Q. Is it not a fact, Mr. Martindale, that H. C. Cross was first president of the bank commencing at its organization or when it began to do business in '72 and remained its president until he went into the railroad business, when his son C. S. succeeded him?

A. It is.

61 Q. Is it not a fact that H. C. Cross was in debt all the while largely to the First national bank?

A. That I don't know.

62 Q. Is it not a fact that you with C. S. Cross had been for years through different banks carrying the indebtedness of H. C. to the First national bank?

A. Not that I knew of. If I did, I didn't know it.

63 Q. C. S. Cross on November 16th, at just about one o'clock p. m. in the year 1898, voluntarily ended his own existence?

A. Yes sir.

64 Q. The bill of sale marked "Exhibit D" to the bill of complaint appears to be dated November 15th, 1898; it would be the day before Cross's death?

A. Yes, that is right.

65 Q. How long had C. S. Jobes as bank examiner been constantly in that bank making examination at that time, November, 1898?

A. My best recollection is that he came on the Thursday before and stayed until Saturday night, and then was there Monday morning, which would probably be the 14th; I am not certain about the dates.

66 Q. Well some days before Cross's death?

A. Yes, some days; my recollection is that Mr. Jobes was there some four or five days.

67 Q. Had he been there six months before that to make an examination?

A. Yes, some time in the spring, I think in May.

68 Q. Now, on the 15th of November, 1898, and after supper is it not true that C. S. Cross and yourself with C. S. Jobes as the bank examiner remained for hours and up until eleven o'clock that night in the bank concerning an examination and investigation that Jobes as examiner was then making?

A. We had a meeting there that night.

69 Q. Is it not a fact that C. S. Jobes that night, in following out the duties of his office, put both you and Mr. Cross under oath and examined you concerning indebtedness, liability, property, etc.?

151 A. He put us under oath, but did not ask me any questions I recall. He told me in the evening before I went home to supper, "I want to put you and Mr. Cross and Mr. Davis under oath;

I don't care anything about you and Mr. Davis, but I don't want to embarrass Mr. Cross," were about the words.

70 Q. In that discussion and talk if it was not altogether between Mr. Jobes and yourself, did you not hear in the conversation back and forth between C. S. Cross and Mr. Jobes about the amount of indebtedness of H. C. Cross and how it had been carried and all that

A. I do not recollect any such conversation in reference to Mr. H. C. Cross.

71 Q. Is it not a fact that that night between seven and eleven o'clock both you and Cross, or Cross alone in your presence, and acquiesced by you by your not contradicting it, in any way inform Mr. Jobes as examiner that all of this Sunny Slope property, which is now the entire bone of contention in this suit, was free and clear and all belonged to the bank, that is it would all inure to the benefit of the bank, that is it would be Cross's and you would be able to pull through and get along without closing the doors?

Objected to by the complainant the cross-complainant First National Bank of N. Y. and the intervenor Ford Harvey as immaterial and irrelevant and further that the rights of these creditors now could not be jeopardized by anything Mr. Martindale may have said or failed to say.

Objection overruled.

A. I have no recollection of any such conversation.

72 Q. Do you claim that the liability of H. C. Cross carried as it had been by yourself and C. S. Cross through notes in half a dozen Eastern banks for years, was not discussed at all that night?

A. Discussed that night in the meeting?

73 Q. Yes.

A. I do not recollect it if it was.

74 Q. Did you not pick out and tell Mr. Jobes what part of this indebtedness was virtually yours and what part was Cross's?

A. I recall saying to Mr. Jobes if there was any paper I had in the bank that he objected to I would take it out in ten days. But as to discussing anything about Mr. H. C. Cross's indebtedness to the bank, I have no recollection of it at all.

75 Q. You now know, do you not, that H. C. Cross did owe the bank practically all the while of its existence, and a large sum when he ceased to be its president?

A. Well, I never thought he owed the bank anything.

76 Q. I am asking if you do not know that is a fact?

Objected to. Objection sustained.

152 77 Q. Mr. Martindale, I notice this bill of sale of July 15th seems to be written on two separate pieces of paper of the same kind of ruling and texture and has been folded together many a time and has all the while been in this position. What shape was it in when you first saw it?

A. That would be a pretty hard question for me to answer.

78 Q. You (notices) that something has been torn off above, did

you not? Could it have been written on Sherman House letter-head?

A. I always supposed it was written on bank letter-head and the heading torn off. All I know about it is that Cross handed it to me as it is.

79 Q. Would you say it was not written on letter paper of the Sherman House in Chicago?

A. I wouldn't say what paper, but it is just as it was handed to me by Mr. Cross.

80 Q. Would you say you did not receive that from the hands of Mrs. Cross, widow of C. S. Cross, after C. S. Cross's death?

A. I would.

81 Q. Mr. Martindale, did you not get out of Mr. Cross's box and from among his papers after his death quite a number of papers?

A. Mr. Cross's box?

82 Q. Yes, or out of his pocket?

A. No, I did not.

83 Q. I will ask you if you did not get a number of papers from Mrs. Cross after the death of Mr. Cross, and those papers were delivered to you at your request?

A. I got some papers from Mrs. Cross after Mr. Cross's death, but they were not delivered to me at my request.

84 Q. Now, that was in a very few hours after his death?

A. The same evening.

85 Q. And you were twice over to her home to get papers?

A. Yes, that night.

86. Now, Mrs. Cross called you up about eleven o'clock and you went and got some papers?

A. The first envelope Mrs. Cross gave me when they brought the body in from the farm, and the second time at ten or eleven o'clock she or somebody telephoned me from the house, and I went over and she gave me another package.

87 Q. Did it include any of those bills of sale that have been delivered here?

A. It did not.

88 Q. Now, Mr. Martindale, I will ask you another question, and that is this: Had you and Mr. Cross been trying for several weeks and perhaps longer, months, trying to sell the Sunny Slope farm and the stock on it in order to turn the proceeds into the bank to discharge any indebtedness of Mr. Cross?

153 A. Mr. Cross had been talking of selling it six months or more. There was never anything said about turning the proceeds over to the bank.

89 (Q.) He had been trying to your knowledge, to sell it for six months prior to his death?

A. Well, it might have been a year, I don't know. We talked it off and on for a good while.

90 Q. What did he say he wanted to do with the proceeds?

A. He never said.

91 Q. You mentioned, on the 15th of November when Mr. Cross

came to your house you asked him if they were likely to close the bank; by that you meant the examiner closing it?

A. That is what I had reference to.

92 Q. How long had the matter of the probability of closing the bank been discussed by you and Mr. Cross, how far back?

A. It had never been discussed at all. Mr. Jobes had been there a day or two, perhaps Saturday or Sunday——

93 Q. Didn't you and Cross talk the matter over with Jobes at his examination in May previous?

A. I don't recollect of having any conversation with Mr. Cross and Mr. Jobes and myself; Mr. Jobes and I talked it over some.

94 Q. In May?

A. Yes.

95 Q. And didn't he grant an indulgence of six months provided certain papers were gotten out?

A. Not that I know of.

96 Q. Mr. Martindale, did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

Objected to by the complainant, the cross-complainant First National Bank of N. Y. and the intervenor Ford Harvey as not cross-examination. Objection overruled and exception taken.

97 Q. Did you receive a bill of sale prior to the July bill of sale?

Same objection. Objection overruled.

A. Yes sir.

98 Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.

99 Q. Look it over and tell the court if that is what you received.

A. That would be my best judgment.

100 Q. When did you receive that?

A. Early in March.

101 Q. Perhaps the date of it?

A. I would think so.

102 Q. What did he say?

154 A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover that amount.

103 Q. Mr. Martindale, I will ask you this, if you did not state in my office in the presence of Judge Buck, Judge Kellogg and both of the Maddens and myself and Mr. Albaugh, that Mr. Cross said he was using large sums of money of the bank and that he wanted to use more and that he wanted to make the bank secure?

A. No sir, I did not say that.

104 Q. And in that conversation when you — asked to give the entire conversation that occurred between you and Mr. Cross on this bill of sale, didn't you state there that Mr. Cross said to you, "I have been using large sums of money for Sunny Slope and I have to use more money for Sunny Slope, and I want to secure the bank"?

A. He didn't say that.

105 Q. Didn't you state that?

A. I don't think I did.

106 Q. Were you asked there to give all the facts concerning the delivery of that bill of sale to you?

A. I think so.

107 Q. Now in that conversation did you mention that sum you mentioned a few moments ago, of $7500.00? Did you mention that in that room?

A. If I did not my attention was not called to it.

108 Q. No, but you were asked to give all the particulars.

A. My best recollection would be that I referred to the Leibfried matter.

109 Q. Weren't you brought there and requested to state the circumstances surrounding the delivery of this bill of sale?

A. All the bills of sale.

110 Q. And you attempted to do that?

A. Yes.

111 Q. And you say now that you did not say then that it was given because Mr. Cross had been using large sums of money for Sunny Slope and that he would have to use more?

A. I don't believe Mr. Cross ever told me that.

112 Q. But did you say that?

A. I don't believe I did.

113 Q. You say Mr. Cross gave you a bill of sale in July growing out of the Whitley bond transaction?

A. Yes.

114 Q. And he gave you another bill of sale on November 15th?

A. Yes.

115 Q. The day prior to the bank failure?

A. Yes.

116 Q. Did you know—you were a director in the bank at that time?

A. I was.

117 Q. At the time you received the July bill of sale and at the time you received the November bill of sale you knew of Mr. Cross's indebtedness to the bank?

A. No, I did not.

118 Q. I will ask you first if that is your signature?

A. Yes.

119 Q. Now, you knew that to be a detailed statement of your relation to the bank, relation of Cross and Martindale to the bank, relation of the bank to other customers so far as bills payable were concerned?

155

A. I haven't read that, and I don't know what Mr. Cross wrote.

120 Q. You say, Mr. Martindale, that Mr. Jobes talked to you in May about the condition of the bank?

A. Yes, we had some general talk about it.

121 Q. Then in July Mr. Foreman made an examination of the bank?

A. Yes.

122 Q. And you know that he made a report to the comptroller of the condition of the bank?

A. Well, I suppose he did.

123 Q. Don't you know that word came back from the comptroller as to what Mr. Forman had reported, and that this letter was written for the purpose of convincing the comptroller that Mr. Jobes in his report and Mr. Forman in his report was not correct?

A. No.

124 Q. Then, when you signed this, what did you think you were signing?

A. I supposed I was signing what I had for twenty years or more, what was a report of the bank.

125 Q. Well, did you sign a report of the bank without knowing what it was?

A. Only as it was reported to me.

126 Q. Well, your son H. W. Martindale, was a director in the bank, wasn't he?

A. Yes.

127 Q. Didn't you in addition to signing that, cause your son H. F. to write this letter to the controller?

"MADISON, KANSAS, *Aug. 2nd*, 1898.

Controller of the Currency, Washington, D. C.

DEAR SIR: As to your favor of July 22nd, 1898, would say that the answer made under date of August 2nd, 1898, meets with my approval.

Respectfully, H. F. MARTINDALE."

A. No, Mr. Cross had that written.

128 Q. How do you know Mr. Cross had it written?

A. Because I never.

12– Q. Well, how did you know Mr. Cross had it done?

A. Well, we talked about it.

130 Q. What was your object in having Howard coincide with what you had said?

A. Because I supposed Mr. Cross had made it out all right.

131 Q. Then you wanted the controller to have your personal guarantee that these statements were correct, and in addition to that wanted your son to guarantee that they were correct?

A. I believed they were correct.

132 Q. Then this statement in here under the date of August 2nd that the cattle of Sunny Slope were free and clear from incumbrance, what did you mean by that if you then held a July bill of sale to secure you against the indebtedness in the First na-
156 tional, Fourth national and Harvey and any other indebtedness that Cross might owe and you were on the paper with him. What did you mean by saying here it was free and clear?

A. I did not know it is in there.

(Said letter, marked Ex. "J" here read to witness.)

133 Q. Now, Mr. Martindale, you certified to that and you say Mr. Cross procured your son to sign it, that all this property of Mr.

Cross's was free and clear from incumbrance, how did you come to do that?

A. I do not think that was ever all read to me.

134 Q. Do you mean by that after the credit of the bank had been attacked and the serious matter whether the bank could make a suitable showing to the comptroller and that you knew Mr. Cross had procured your son to certify to it, which made a majority of the board of directors, and at the time you did it you did not know and did not take the interest to have the entire thing read to you?

A. I think some sheets have been substituted, some things in there I never heard of.

135 Q. Then if the item had been there that it was free from incumbrance, you would have called attention to the fact that you had a bill of sale?

A. I don't know whether I would.

136 Q. Now, there was some other matters you were interested in, there was a shortage in New York, wasn't there?

A. Not that I ever knew of.

137 Q. Didn't you discuss that matter with Mr. Jobes, and when he said your books showed a large amount and there wasn't that amount there as shown by the New York bank books; that was discussed by you and Mr. Jobes, wasn't it?

A. I don't think I had any talk with Mr. Jobes in the fall about it.

138 Q. Did you have in the spring?

A. Yes, Mr. Jobes called my attention to some *in*discrepancy.

139 Q. Do you mean Mr. Jobes called your attention as early as spring or summer that your bank was carrying a false entry, that is showing larger balance in New York than was in New York?

A. I think Mr. Jobes called my attention to $30,000.00 carried as Cross & Martindale in New York, is my recollection.

140 Q. I am not asking what was carried as Cross & Martindale. Did Mr. Jobes at any time prior to the failure of the bank state that there was a shortage in New York, that there was false entries carried in New York bank for the purpose of covering up that shortage; that there was a shortage in St. Louis, that there was false
157 entries carried in St. Louis bank for the purpose of covering up that shortage; that there was a similar condition so far as Kansas City was concerned; that the Bank of Madison, of which you were president, you were carrying there a false statement of the condition of those two banks?

A. I don't think Mr. Jobes ever had any talk about it, only about New York.

141 Q. Didn't Mr. Jobes state, "About how much of this shortage is caused by you," and didn't you then explain that it was done by the banks charging up Cross & Martindale's paper when it became due, then refusing to discount for the whole amount, but discounting for a small amount; and didn't he then put the question, "How much of this shortage was for your benefit?" and you answered him giving him the amount?

A. I only recollect of his talking about the New York.

142 Q. How much of the New York amount was for your benefit?

A. None for my benefit.

143 Q. How much did you tell him it was for?

A. I told him Mr. Cross was keeping that account, and not to show a discount, it had been the custom to make individual notes there in New York for the benefit of the bank.

144 Q. When did you commence making individual notes for the benefit of the bank; why did the bank need any notes to get along? It wasn't borrowing money was it?

A. It was borrowing for customers.

145 Q. Instead of discounting notes, do you mean to say you and Cross would borrow it for yourself?

A. No, sir, we put up our individual notes as collateral and sent the other notes there, and our notes stood as collateral and the proceeds came to the bank.

146 Q. Weren't you discounting other notes there that were purely for your own benefit?

A. Never in the world.

147 Q. And weren't those notes charged up to the bank?

(Court here adjourned for dinner.)

148 Q. I asked you, Mr. Martindale, just before adjournment if it is not a fact that you had caused a Ryan note that was purely an accommodation note to be made?

A. To myself?

149 Q. Yes.

A. Mr. Ryan and I were partners, handled some cattle together.

150 Q. Then it was a joint note?

A. Yes.

151 Q. Now, Mr. Martindale, wasn't it purely an accommodation note that Ryan made to you, in which there were no cattle back of it at all?

A. Yes, there were 400 cattle back of it.

158 152 Q. That is a letter of yours, isn't it?

A. Yes, that is a letter of my signature.

Letter marked Ex. "G" is here read to witness.

A. Mr. Cross wrote that up. Of course, there was no mortgage on the cattle and I stood behind the note and guaranteed it?

153 Q. Did Ryan have any interest in the cattle?

A. Yes.

154 Q. Haven't you asked Mr. Ryan for a purely accommodation note?

A. Not unless it is a renewal of this or something of that kind.

155 Q. Just the one ten-thousand-dollar note?

A. There might have been others, I wouldn't say.

156 Q. That is your signature, isn't it?

A. Yes, sir.

Letter marked Ex. "F" is here read to witness.

157 Q. Now I desire to call your attention to how the ten-thousand-dollar note at St. Louis was paid.

A. My recollection is one who sent to Emporia and I paid it all.

158 Q. Was it paid by C. V. Eskridge note which you held on Mr. Eskridge?

A. No, sir.

159 Q. And isn't it a part of the indebtedness now at St. Louis growing out of the Ryan note for your sole benefit?

A. No, sir.

160 Q. Were you and Mr. Cross in partnership?

A. In what way?

161 Q. Well, in any way?

A. We were jointly interested in Salina. I guess I will modify that a little, Mr. H. C. Cross and I were.

162 Q. Anything else besides Salina?

A. Why we had a little interest at Carl Junction Missouri.

163 Q. You and Mr. C. S. Cross were partners down there weren't you?

A. I had reference to C. S. Cross.

164 Q. And you and C. S. Cross continued the Salina business?

A. Yes.

165 Q. Well, the Salina Gas Co. owed the bank nearly $75,000.00 didn't they?

A. I never thought so.

166 Q. Well, did you know anything about that?

A. Well, I thought I did.

167 Q. Well, what did you think they owed the bank?

A. I thought the Salina Gas Co. was indebted to the bank $5000.00.

168 Q. You did not know the indebtedness to the bank was as much as $75.000.00?

A. I did not.

169 Q. Well, you used large sums of money in Galena, you and Mr. Cross?

A. No, sir.

159 170 Q. Weren't you a full partner with Mr. Cross in Galena?

A. No, sir.

171 Q. You are sure?

A. Yes.

172 Q. Do you remember whether Mr. Cross had just returned from Chicago when he gave you a July bill of sale?

A. I don't recollect.

173 Q. Call to your mind the injunction and applications for a receiver in the Leibfried suit. From that time until the bond was given, did Mr. Cross take a trip to Chicago?

A. I don't remember.

174 Q. You don't remember whether Mr. Cross had just returned from Chicago with the bill of sale on Sherman House letter-head paper?

A. Not that I recollect.

175 Q. There wasn't such a thing as a Sherman House letter-head torn off afterward?

A. No, sir.

176 Q. And you never saw a bill of sale with the Sherman House letter-head on it?

A. No, sir.

177 Q. Well, you called on Mrs. Cross soon after the death of C. S. Cross?

A. Yes.

178 Q. You asked her for some papers?

A. I asked if there was any papers for me.

179 Q. Did you ask her about any bills of sale?

A. No.

180 Q. She gave you some bills of sale?

A. She gave me a letter with a bill of sale.

181 Q. You have read what is called his dying declaration?

A. She didn't give me that when I first called.

182 Q. Later you got that?

A. Later I got two of them.

183 Q. Now the earliest bill of sale that you have bears what date? July 14th or 15th?

A. Earliest bill of sale?

184 Q. Yes.

A. I got two that night.

185 Q. Yes, but you had had one dated July 15th prior to that?

A. Yes.

186 Q. Now, the earliest of the two you got at the house?

A. I don't recollect dates.

187 Q. Now, these two bills of sale bearing the date of the 14th and then the one you say he delivered to you bears date of the 15th, and then one bears date of November 15th; which you say was delivered to you at your house. Those four and the one bill of sale delivered to you in March are all the bills of sale you ever saw of Mr. Cross's; that is correct, isn't it?

A. At this time I don't recollect of any other.

188 Q. At this time you don't know of any other?

A. No, sir.

189 Q. Now, this dying declaration of Mr. Cross, which you say was with these papers, which you have read a good many
160 times that bears date of May 12th,—the July 13th is the statement you have reference to where he speaks about dying and making you a bill of sale,—now at that time, if this was written on July 13th, there wasn't a bill of sale in existence, was there, except the March bill of sale?

A. Not that I would know of.

190 Q. Then when this was written July 13th, the only bill of sale that you had was a bill of sale he gave you to protect the bank in March, that is correct isn't it?

A. Yes.

191 Q. And the time that you received the bill of sale was after Cross's death?

A. If that is the one Mrs. Cross gave me, yes.

192 Q. And it bears date of July 13th; in that he says he has given you bill of sale on all his property?

A. Yes.

193 Q. Do you know what bill of sale he refers to?

A. Only on supposition.

194 Q. What is your supposition?

A. That he had reference to it.

195 Q. The only bill of sale in existence at that time was the March bill of sale?

A. Yes.

Redirect examination:

196 Q. I understood you to say at the time this July bill of sale was given to you that you were indebted to the First National Bank of New York in the sum of thirty thousand dollars?

A. Yes.

197 Q. State whether or not by subsequent renewals that indebtedness was brought down to the one set out in this complaint.

A. That is my judgment.

198 Q. I ask you about the indebtedness existing at the time of giving of the July 15th bill of sale that you mention, is this a renewal of that?

A. Yes, sir, that is my recollection.

199 Q. Now, at the time of the execution of the July 15th bill of sale you said there was twenty thousand dollars for which you and Cross were jointly indebted to the Fourth national bank by reason of certain endorsements?

A. Yes.

200 Q. State whether or not the two notes which I hand you, being copies of the one attached to the plaintiff's petition, are the renewals.

A. That is my best judgment.

201 Q. You said that at the time these bills of sale came to your hands after the death of Cross that you received also from -rs. Cross another paper?

A. I received two letters from Mrs. Cross that night.

202 Q. Kindly look at these two and tell us if those are the ones.

(Hands witness Exhibits H and H2.)

161 (—.) You are acquainted with the handwriting of C. S. Cross?

A. Yes.

203 Q. You may state whether these papers are in his handwriting?

A. Yes.

Letters marked Ex. H and H2 here read.

204 Q. I will ask you, Mr. Martindale, what personal attention you gave to the details of the business of the First national bank.

A. I gave comparatively none as to the books of the bank or any-

thing of that kind. In fact, I never made an entry in the bank in my life.

Objected to with regard to part referring to book-keeping.
Objection overruled.

205 Q. Mr. Martindale, please state whether or not you were a partner with either of the Crosses in the Salina gas & electric light business?

A. Mr. H. C. Cross and I were stockholders in that company?

206 Q. Stockholders?

A. Yes.

207 Q. Not partners?

A. No, it was a corporation and we were stockholders.

208 Q. Were you partners, you and H. C. Cross or S. C. Cross in any enterprise or simply stockholders in joint corporations?

A. Only in Carl Junction where there were four parties, each had one-fourth.

— Q. How extensive was it?

A. Some leases on some mining land.

210 Q. Well, did it involve any considerable amount of property?

A. About $800.00 possibly.

211 Q. Was any indebtedness carried over from that concern to the bank?

A. No, that was all paid as we went along.

Recross-examination:

212 Q. You were one of the original incorporators of that bank?

A. Yes.

213 Q. And have always been its vice-president?

A. No sir.

214 Q. Always been a director?

A. Yes sir.

215 Q. And for the last four or five years you have had your office in the bank?

A. Yes.

216 Q. And have been there daily?

A. No I could not say that.

217 Q. You had no other business to look after than your farm and bank?

A. Had Eureka and Madison.

218 Q. Well, you were at the bank every day you were in the city?

A. Yes.

162 219 Q. You put your son in there for the purpose of familiarizing yourself with the bank?

A. He was in there perhaps thirty days before the bank closed.

(290) Q. No longer than that?

A. Wouldn't be positive about the date, but about that time.

221 Q. Didn't you state to Mr. Jobes the night before the bank closed that this Sunny Slope property would be sold; Mr. Jobes turning to Cross and asking when it could be, and Mr. Cross saying

I can realize so much in a certain time, and didn't you speak up then perhaps it would take a little bit longer to turn it into money, but in 30 days it could all go to the bank?

A. No.

(299) Q. You never made such a statement?

A. My recollection is that Mr. Cross was in Chicago, had an option on the Sunny Slope cattle and property, when he came home, and Mr. Jobes was there, he said he could sell Sunny Slope to Mr. Stannard for so much money, forty thousand dollars; I told him he better sell it and immediately wired.

223 Q. I am not asking you about wiring. Did you and Mr. Cross talk to Mr. Jobes about Sunny Slope being sold and the money coming to that bank?

A. I do not think I said anything of the kind.

224 Q. Well, that was the statement to the receiver the night before the bank closed?

A. I don't recollect.

225 Q. Don't recollect that?

A. No.

226 Q. Don't you remember insisting when Mr. Cross said he could do it in ten days and that would put forty thousand dollars in the bank and make it that much better, don't you remember saying, "Mr. Cross, you better say to the examiner, 'Give us thirty days to put that in cash?'"

A. It might have been. I have no recollection of it now.

227 Q. Now, how did you expect that property to be sold and cashed to the bank if you had a bill of sale?

A. I don't remember any such conversation.

228 Q. You won't swear you didn't have?

A. No.

229 Q. This shortage at Madison was how much?

A. What shortage?

(238) Q. The difference between the accounts as stated by the First national and the actual condition of affairs as shown by the Madison bank.

A. I don't know anything about that.

231 Q. You understood it was $7000.00?

Objected to. Objection sustained.

(239) Q. Now, wasn't that matter discussed by you and Mr. Jobes on Friday before the bank failed, and didn't Mr. Jobes ask
163 you to go to Madison and get a statement of that and called your attention to that fact, and didn't he state there, "How much of that are you responsible for," and didn't you make a statement from the Madison bank?

A. I didn't say I was responsible for anything between the First national bank and Madison bank.

233 Q. Now, you know J. M. Johnson and John Henning and Mr. Geo. Plummer?

A. Yes.

234 Q. Did you have a conversation with John Johnson the morn-

ing after, or the next morning, in which you told him the proceeds of Sunny Slope would go to the First national bank?

Objected to as incompetent, irrelevant and immaterial. Objection overruled.

A. I would not say; of course, it was soon after Cross's death—and Johnson was at my house——

235 Q. You won't say you didn't tell him that?

A. No I wouldn't say I did not.

236 Q. Now, several days after that do you remember having a meeting with Johnson and Henning and perhaps Plummer at John Henning's meat market; do you remember telling him there that Sunny Slope would sell for forty thousand dollars and same would go to the bank?

Same objection. Objection overruled.

A. They were talking of it and asked if I would claim under my bill of sale and I told them no.

237 Q. Is it not a fact that there was a question made of the sale in that conversation?

A. Yes.

238 Q. And you said, "Every dollar of it goes to the bank."

A. I don't recall the latter part of it.

Redirect examination:

239 Q. At the time these bills of sale were given in July and November what did you consider the reasonable value of property that you owned at that time in your own right, your individual property?

A. At that time?

240 Q. Yes.

A. I considered it $200,000 anyway.

241 Q. You certainly thought yourself solvent at that time?

A. I did.

242 Q. This sale of Sunny Slope to Stannard that was talked about; did that include the land or loose property?

A. It included the land and personal property.

243 Q. That was the sale he was talking about making to Stannard?

A. Yes. The land was in H. C. Cross's name.

244 Q. How much land?

A. 600 acres is my recollection.

245 Q. What was that worth?

164 A. I think it was estimated at $15000.00.

246 Q. Mr. Martindale, at the time of the failure of the bank there, did you suppose you were amply able to meet all the obligations you were on?

A. I hadn't any doubt about it.

247 Q. And did you suppose if Sunny Slope was sold for $40,000.00 that would save the bank?

A. Yes.

248 Q. And you told those gentlemen you would let that go to the bank?
A. Yes.
249 Q. And you think the bill of sale was mentioned in the same connection?
A. I think it was.

Each objection herein noted as having been taken by complainant was also separately taken by cross-complainant First National Bank of New York, and was also separately taken by Ford Harvey, intervenor. To each ruling on objections to testimony complainant, said First National Bank and Ford Harvey each separately excepted at the time.

JOHN MADDEN called as a witness by M. Albaugh receiver, being first duly sworn, testifies as follows:

Direct examination.

By Mr. LAMBERT:

Q. —. You are a member of the bar and reside at Emporia?
A. Yes.
2 Q. Acquainted with Wm. Martindale?
A. Yes.
3 Q. Do you remember during the time we were taking testimony of having a subpœna issued for Mr. Martindale to testify in the case, and he and his attorneys asking that he be permitted not to testify?
A. Yes.
4 Q. And arrangements made if certain information concerning bills of sale were given, he would be let off?
A. Yes.
5 Q. You may tell this court what he said occurred between himself and Mr. Cross in March, 1898, at the time the bill of sale was delivered by Mr. Cross to himself?

Objected as incompetent, irrelevant, and immaterial and an attempt to impeach their own witness Mr. Martindale, and so far as being a declaration of Mr. Martindale is merely hearsay, and not competent to bind parties who join issue in this case.
Objection overruled.

A. Mr. Martindale stated that he would give us a statement as to what the facts were and proceeded to do so with reference to the bill of sale of March 4th (I think that is the date), that Mr. Cross stated
to him that he had borrowed money from the bank and was
165 largely indebted to the bank and he would have to use more
money for Sunny Slope, and that he made out this bill of sale and handed it to Mr. Martindale, Mr. Martindale stated, as security to the bank for those money matters mentioned.
6 Q. You may now state if he said in that conversation anything about $7500.00 or any other amount that Cross owed the bank.

A. I have no recollection of any such statement. My best belief is he never made any such statement.

It is moved by complainant that the testimony be stricken out for the reason that it is an attempt to impeach the testimony of their own witness and also attempt by hearsay to establish the validity of the bill of sale set up by the receiver in his cross-bill, as incompetent testimony for such purpose.

Motion is sustained. To which exceptions are taken by receiver.

Mr. MORTON ALBAUGH called as a witness on his own behalf as receiver being duly sworn testifies as follows:

Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh, you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him in March 4th, and if so, state fully what that conversation was.

Objected to by complainant and by First National Bank of New York and Ford Harvey on grounds of being hearsay and an attempt to impeach their own witness. Objection overruled and exception taken.

A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

2 Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?

Objected to by same parties and for same reason. Objection overruled and exception taken.

A. I am quite sure he did not.

166 Cross-examination:

3 Q. Did you state when that was?

A. I could not give the exact date this conversation took place.

4 Q. It was since this suit was commenced?

A. Yes.

It is moved by the complainant and by the First National Bank of New York and Ford Harvey that the testimony of witness be stricken out with reference to the statement of Mr. Martindale as an attempt to impeach testimony introduced for the purpose of establishing their own case, and it is only hearsay, and is incompetent for the purpose of establishing any issue raised by Mr. Albaugh here, as receiver.

Overruled. To which exceptions are taken.

5 Q. What was the date of that conversation?

A. I couldn't give the exact date.
6 Q. Can't you state the month?
A. I think it was some time in January.
7 Q. Of this year.
A. This year.
8 Q. How long did this conversation continue?
A. Oh, we were probably present there some ten or fifteen minutes.
9 Q. Who all were present?
A. There was Mr. Lambert, Mr. Huggins, Mr. Madden, Mr. Martindale, Mr. Kellogg. I am not sure whether Mr. Spencer was there.
10 Q. Who took part in that conversation in addition to Martindale?
A. Well, Mr. Martindale, Mr. Lambert, Mr. Madden—I don't know, most all did.
11 Q. Did you say anything?
A. I don't recollect just what I said; I think I did.
12 Q. Do you recollect that you said anything?
A. I do not.
13 Q. Do you remember what Mr. Lambert said?
A. I remember his questioning Mr. Martindale quite a little as regards these different bills of sale.
14 Q. What questions did he ask Mr. Martindale?
A. He asked the particulars in regard to the different bills of sale, time of delivery, etc.
15 Q. Did you talk there with regard to the July bill of sale?
A. Yes, there was talk in regard to the July bill of sale.
16 Q. And the November bill of sale also?
A. Yes.
17 Q. You don't recollect that Mr. Martindale said anything there with regard to any particular sum of money?
167 A. I am quite sure he did not.
18 Q. Not in reference to either bill of sale?
A. I think not in regard to any of them.
17 Q. Didn't you ask him what debts the July bill of sale was to secure?
A. I did not.
20 Q. Any one ask him that?
A. I think not.
21 Q. Any one ask him what the November bill of sale was for either?
A. Oh, yes, what they were given for, but not the specific amounts of money.
22 Q. Were the names of persons the amounts of money were owing mentioned, Fourth National Bank, St. Louis, Bank of New York——
A. I don't recollect that. Of course every one knew the circumstances.
23 Q. Did any one ask Mr. Martindale there whether the March

bill of sale was given with reference to any particular debt; didn't he state it was given for the benefit of the bank?

A. No.

24 Q. No one asked if there was any particular debt covered?

A. No.

25 Q. Were you sitting down or moving around?

A. Sitting down.

26 Q. Did you hear everything that was said?

A. I think so. We were in the rear room, a very small room.

27 Q. But you were not able to say whether you had any talk personally with Mr. Martindale at that time?

A. I would not say I did because the attorneys were discussing it with him and Mr. Kellogg.

28 Q. Both Mr. Graves and myself were present as attorneys for Mr. Martindale, were we not?

A. I don't remember about Mr. Graves.

29 Q. And Mr. Lambert was there as your counsel?

A. He was.

30 Q. And Brother Madden and Mr. Spencer as counsel for the administrator and it was your understanding was it that we all met there in an amicable way and Mr. Martindale would frankly tell the facts relating to all these bills of sale?

A. That was the understanding.

31 Q. Now he was questioned as to each of the three bills of sale?

A. Yes and explained each.

32 Q. And related to the assemblage what purported to be the facts in regard to giving of each of them?

A. Yes.

33 Q. Now, in regard to this sale of March, 1898, after he had mentioned as you have stated, that Mr. Cross said he was indebted to the bank and would have to use some more money; to re-
168 fresh your memory, didn't some one ask (I cannot recollect who), "Did Mr. Cross mention any particular amount of money that he was wanting to use or was owing the bank?" and didn't Mr. Martindale in substance say I think he mentioned he wanted to use $7500.00 in the Leibfried matter.

A. I think not, I am quite positive not.

34 Q. You don't recollect any one asked him about the amount?

A. I do not and am quite positive no one did.

Redirect examination:

35 Q. This was the first information you had of that bill of sale?

A. It was; that is the reason my attention was attracted to it.

36 Q. And upon that bill of sale you set up your answer that you were entitled to the property on that bill of sale?

A. Yes.

37 Q. Where did you hear of it?

A. Mr. Martindale produced it.

38 Q. But you heard of it before that?

A. This March bill of sale?

39 Q. Yes.
A. No.
40 Q. Did any one else know of it except Mr. Martindale?
A. I don't know. That is, I think I heard there was a previous March bill of sale as there was these other two, but not with this explanation that it was given for the benefit of the bank.
41 Q. Wasn't that March bill of sale found in the bank?
A. If it was, it was before I went there.

Mr. I. E. LAMBERT called as a witness on behalf of the receiver being duly sworn, testifies as follows:

Direct examination.

By BUCK:

1 Q. Mr. Lambert were you present at the time Mr. Albaugh has just been speaking of?
A. Yes.
2 Q. And there were present those he mentioned, Judge Graves being present?
A. I think Judge Graves, and I know Mr. Spencer was.
3 Q. You may now state if you had been all the while the attorney for the receiver.
A. Yes sir.
4 Q. And up to that time had never filed any pleadings for the receiver?
A. No, sir.
5 Q. And knew in a general way all that the administrator was doing?
A. Yes, helping the administrator.
6 Q. Now, was this the first time that you had any definite information in relation to this bill of sale apparently dated March 4th, 1898?
169 A. I had heard rumors of other bills of sale dated before this and that they were supposed to be in the interests of the bank, but had no information at all as to whether such a bill of sale existed or not.
7 Q. I will ask you, we had gotten out a subpœna, that is to say the administrator had, to take Mr. Martindale's testimony, and his attorneys said he didn't want to go on the stand, but said he would tell you folks anything he knew——
A. Yes, Mr. Kellogg said for me not to urge him to go on the stand, that he would be in court, and I said we wanted to know what there was in these bills of sale. He said Mr. Martindale did not want to go on the stand and subject himself to cross-examination until his criminal case was out of the way.
8 Q. Did he for the first time, so far as you had any information, exhibit that March 4th bill of sale?
A. Yes.
9 Q. And then right soon after that you prepared the pleadings that you filed for the receiver?

A. Yes, sir.

10 Q. Now, what did he say, if he said anything, about what that was given for?

Objected to for reasons above given by complainant, cross-complainant and intervenor. Objection overruled and exceptions taken.

A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, "I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank."

11 Q. Did he name any amount?

A. No, sir,

12 Q. Was the amount $7500.00 mentioned at all?

A. It was not.

13 Q. Were you giving intent interest and attention to what he was saying?

A. Yes, sir.

It is moved by parties objecting above that the evidence of the witness be stricken out, for the reason that same is hearsay and an attempt to impeach their own witness and prove facts that in no way bind complainants or cross-complainants.

Objections overruled. To which exceptions are taken.

170 Cross-examination.

By KELLOGG, att'y for Martindale:

14 Q. After Mr. Martindale had mentioned that Mr. Cross had said that he was owing the bank and would want to use some other money from the bank, isn't it your recollection that some one there in the room (and I cannot think who) inquired whether Mr. Cross mentioned how much or what particular amount?

A. That is not my recollection at all.

15 Q. There was no talk of that kind by any of the parties?

A. No, sir.

16 Q. Nothing said about $7500.00?

A. No, sir, if anything had been said about $7500.00 with the knowledge I had of what Mr. Cross owed the bank in March of that year it would have impressed my mind so that I would have remembered it. I knew the indebtedness was much in excess of $7500.00 and I would have remembered it.

Stipulation in regard to Leibfried case is here offered in evidence as follows:

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver, etc., *et al.*, Defendants.
No. 7681. Stipulation.

It is stipulated and agreed that the following are facts, and to the extent they may be deemed relevant and material, may be used as evidence in this suit by either party, viz:

On June 17th, 1898, one H. L. Leibfried brought suit in the district court of Lyon county, State of Kansas, against said C. S. Cross for an accounting in partnership and for the recovery of $35,000.00 together with one-half interest in all live stock, machinery and farm implements on said "Sunny Slope" ranch, and for the cancellation of a large amount of promissory notes alleged to have been executed by said Leibfried, including two notes of $20,000.00 each, and asking for the appointment of a receiver and for injunction.

On July 1st, 1898, said court denying a receiver decided to grant an injunction unless said Cross would give bond conditioned to pay any judgment said Leibfried might recover. On that day Cross executed such bond with said William Martindale and H. C. Whitley as sureties and the bond was approved by the judge of said court.

On October 14th, 1898, the jury in said case returned a verdict in favor of Cross and against Leibfried, and on same day Leibfried filed motion for new trial, the consideration of which was continued until January 2nd, 1899, when the court overruled said motion.

The cause was then continued for the purpose of revivor against F. C. Newman, administrator and finally on October 30th, 1899, said suit was dismissed.

On November 26th, 1898, said F. C. Newman was appointed administrator of the estate of said Cross.

The stipulation attached to the amended bill of complaint, marked Exhibit "E" was signed November 26th, 1898.

CUNNINGHAM & HAMER,
Solicitors for (Complain-t) & 1st N. Bk. of N. Y.
BUCK & SPENCER,
Att'ys for F. C. Newman, Adm., etc.

171 Mrs. C. S. CROSS, called on behalf of receiver, being duly sworn, testifies as follows:

Direct examination.

By LAMBERT:

1 Q. You are the wife of the late C. S. Cross?
A. I am.
2 Q. Your name is Mrs. C. S. Cross, is it?
A. Yes, sir.
3 Q. You remember Mr. Martindale coming over to your house a short time after the death of your husband?

A. Yes, sir.

4 Q. What time of day was this, Mrs. Cross?

A. I should think about half past six or seven o'clock.

5 Q. What did he say to you at that time with reference to any papers that Mr. Cross had?

A. He came into my own room and almost the first thing he said to me was, "Have you any papers for me, have you found any papers or is there anything here for me?"

6 Q. Now, do you remember of handing him either at that time or later in the evening an envelope?

A. Yes, sir.

7 Q. Did he open it at that time?

A. Yes.

8 Q. Did he take from the envelope any papers?

A. Yes.

9 Q. You may state to the court if you examined any of them or had an opportunity of looking at them.

A. The papers were—I found in a box; there was a large blank envelope addressed to me and I opened it and in it was just a note said "Give the enclosure to Mr. Martindale at once, there is a question of law involved." I gave him the envelope, which was a Sherman House, Chicago, envelope addressed to Mr. Cross, and Mr. Martindale opened it and there was some papers in it; I could not say just what, as I did not see them all.

10 Q. Did you see any bills of sale that came from that envelope?

A. Afterwards I gave Mr. Martindale another letter which I found about half past ten or eleven, and that one I telephoned him to come and get. In the two of them, I cannot say in which, whether both the bills of sale were in one, or one in each, but there were some bills of sale I saw with the papers.

11 Q. Now, you may say if either of those bills were written on Sherman House hotel paper?

A. The first enclosure was in a Sherman House envelope I know, and one of the bills of sale was on a letter-head, but I don't know whether it was a Sherman House letter-head.

12 Q. There was one on a letter-head?

A. Yes, one on a letter-head and one in regular form.

13 Q. You may state now if you remember where Mr. Cross was about the 13th of July, 1898.

A. Well, he was once during the summer, I think, about that time, he was in Kansas City, or I don't know just where.

Cross-examination.

By CUNNINGHAM:

14 Q. Mrs. Cross these papers that have been referred to here as dying declarations, they were among the papers you turned over to him that day?

A. The papers I turned over to Mr. Martindale I did not see, except the bills of sale; afterwards he showed me some papers.

15 Q. Where did you find these papers?
A. In my own tin box.
16 Q. In your house?
A. Yes.

172 Redirect examination:

17 Q. What do you know, if anything about Mr. Martindale getting papers from Mr. Cross' person?
A. I know nothing about anything of the kind.
18 Q. Now, this box, who had the keys to the box that you say you opened?
A. I had one and my husband had the other.
19 Q. Was it locked at the time you went to the box?
A. Yes.
20 Q. How many times did Mr. Martindale come over there that evening?
A. Twice.
21 Q. Once that he came there of his own volition, and the next time by an invitation extended by you over the telephone?
A. Yes.
22 Q. Did he help to make an examination of Mr. Cross' papers in the house?
A. No, sir.
23 Q. You made the examination yourself?
A. I did.
24 Q. He insisted on the examination being made that evening?
A. He was so insistent that there must be something there that I looked through the papers.

Recross-examination:

25 Q. He came with the body the first time, didn't he?
A. I learned that today for the first time.
26 Q. Would you say now it is a fact?
A. I have no reason to say different, I don't know anything about that.

Mr. F. C. NEWMAN, called on behalf of receiver and administrator being duly sworn, testifies as follows:

Direct examination.

By LAMBERT:

1 Q. Mr. Newman, you are the administrator of the Cross estate?
A. I am.
2 Q. When were you appointed administrator?
A. On the 26th day of November, 1898.
3 Q. 1898?
A. Yes.
4 Q. What day did Mr. Cross decease?
A. The 16th I think.

5 Q. The 16th of November, 1898?
A. Yes.
6 Q. Do you know approximately what the indebtedness of Mr. Cross is outside of the indebtedness to the bank?
A. To the First National Bank of Emporia?
(A.) Yes.
(7 Q.) I could not state exactly, but somewhere between eighty and ninety thousand dollars.

Mr. C. S. JOBES called on behalf of receiver being duly sworn testifies as follows:

Direct examination.

By LAMBERT:

1 Q. Mr. Jobes, you may state what official position you occupied in November, 1898.
A. National bank examiner.
2 Q. And what position do you now occupy?
A. Same.
173 3 Q. Did you make an examination of the First national bank in May, 1898?
A. First National of Emporia?
4 Q. Yes.
A. I did.
5 Q. And again in November?
A. Yes.
6 Q. You may state, if you informed Mr. Martindale as to the amount of C. S. Cross's indebtedness to the bank, and if so, when?
A. I do not think I ever informed Mr. Martindale of the gross amount of Mr. Cross's indebtedness to the bank; I discussed with him different portions of his indebtedness as represented by different transactions, but I do not believe I ever undertook to aggregate it in any conversation with Mr. Martindale.
7 Q. When was this first conversation?
A. The first conversation I had with him respecting that feature and particularly indebtedness growing out of discrepancies——
8 Q. Do you mean the difference in accounts of the bank's correspondents.
A. Discrepancy as shown by the First National Bank of Emporia, and First National of New York; that particular matter was discussed between Mr. Martindale and me some time early in July, 1898, when I was seeking an explanation as to the discrepancy shown by the books of the First National of Emporia, and the statement made to me by the First National of New York. I informed Mr. Martindale that a very considerable discrepancy existed and what Mr. Cross's explanation was with reference to $35000.00 discrepancy, and asked him whether he verified that statement, which he did, and then advised him with reference to another discrepancy in the same account or another feature of the discrepancy, and

that he could not undertake to explain, but I informed him it was in the neighborhood of $10,000.00.

9 Q. You discussed with him Mr. Cross's large indebtedness to the bank prior to November 15th?

A. Yes.

10 Q. You may now state if Mr. Martindale disclosed to you the amount he was responsible for so far as shortage was concerned, and if so, state what that amount was?

Objected to as incompetent, irrelevant and immaterial and hearsay and not binding upon the complainant, cross-complainant, and intervenor.

Objection overruled and exceptions taken.

A. I will have to refresh my memory by referring to memorandum I made at that time. In a conversation had with Mr. Martin-
174 dale Mr. Cross and Mr. Davis, cashier of the bank, I recited the discrepancies I had noticed in the several bank accounts with which the First National Bank of Emporia did business, informing them that the First National of New York *I* discovered a discrepancy of $6787.50. In that account, it was explained to me by Mr. Cross, or Mr. Martindale or both of them, a $300 item in that discrepancy was liability of Martindale & Cross, $5000.00 was a liability of Mr. C. S. Cross, $1487.50 was a liability *or* inured to the benefit of Martindale and Cross jointly. In the National Bank of Commerce of Kansas City a discrepancy of $2550.27 was discovered. That was admitted to have inured to the personal benefit of Mr. C. S. Cross. $17000.00 in the account of the Bank of Madison, $12000.00 inured to the benefit of Mr. Cross and $5000.00 to that of Mr. Martindale. In the Fourth National of St. Louis $22798.94, $10,000.00 of which was a note of W. J. Ryan maturing and held by the St. Louis bank, which had been charged to the account of the First National Bank of Emporia. My memorandum here does not appear to indicate whether that was a joint benefit or an individual benefit, but my recollection is that it was suggested that evening that it inured to the joint benefit of Martindale & Cross. I would like to amend that answer to say the memorandum does show it inured to the joint benefit of Martindale and Cross; $5000.00 of that matter appears to have inured to the personal benefit of C. S. Cross, the balance to the joint benefit of Martindale and Cross. That discrepancy was discussed and gone over on the evening of November 15th.

Ex. "A."

STATE OF KANSAS, }
County of Lyon. }

In the District Court Thereof.

H. L. LEIBFRIED, Plaintiff, }
vs. }
C. S. CROSS, Defendant. }

Whereas, on the 29th day of June, 1898, on the hearing of the application made by said plaintiff for a temporary injunction in the above-entitled cause before Hon. W. A. Randolph, judge of the said district court, at his chambers, it was ordered that unless the defendant, C. S. Cross, within forty-eight hours would give a bond to the plaintiff, to be approved by the said judge, to pay any final judgment that said plaintiff might recover in said cause.

175 Now, therefore, we the undersigned, C. S. Cross as principal and Wm. Martindale, H. C. Whitley as sureties, do hereby undertake to the said defendant and promise and agree in consideration of said temporary injunction not being granted, that he will promptly pay any final judgment recovered by plaintiff against said defendant in said action. Said C. S. Cross reserving the right before payment of any judgment that may be rendered against him of having the same reviewed in manner provided by law by the proper reviewing court.

Witness our hands this July 1, 1898.

C. S. CROSS.
WM. MARTINDALE.
H. C. WHITLEY.

Approved by me this July 1, 1898.

W. A. RANDOLPH, *Judge.*

Indorsement: No. 9506. 496. H. L. Liebfried *vs.* C. S. Cross. Bond. Filed July 1, 1898. S. F. Bucher, clerk.

Ex. "B."

EMPORIA, KANSAS, *Nov.* 15, 1898.

For one dollar and other valuable considerations the receipt of which is hereby acknowledged, I hereby sell, transfer and assign unto W. Martindale or his assigns all my right, title and interest to the following personal property, located in Emporia twp., Lyon county, Kansas, and upon what is known as Sunny Slope farm and the leased lands thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc., and also all other personal property located thereon whether specifically described herein or not.

Given under my hand and seal the date above written.

C. S. CROSS.

Ex. "C."

For and in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged I do hereby sell, transfer and assign unto W. Martindale as trustee all my personal property of every kind and description and whatever located, except the contents of my house where I am now living in Emporia, Lyon Co., Kansas, excepting all my policies of life insurance—this sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to 8375.00 and int. which does not include the 4500 Davis & Cross note. The property which I
176 transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses, now located on Sunny Slope farm, Lyon Co., Kansas, together with all other personal property thereon or on farm adjacent—also all notes, stock, bonds and mortgages (excepting as before stated those securing my indebtedness to my mother Sue S. Cross).

The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon Co. court, after that he is to pay himself for any paper upon which he and I are mutual makers or endorsers. The balance if any to be paid the First Nat. Bank of Emporia, Ks., for all matter I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. CROSS.

Ex. "D."

Know all men by these presents, that in consideration of the sum of one dollar and other valuable considerations the receipt of which is hereby acknowledged, I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators and assigns, the goods and chattels named below:

All of my cattle, about 300 head more or less and all the other personal property located on my Sunny Slope farm in Lyon Co., Kansas. All my interest in all the personal property, mills, leases, etc., located at or near Galena, Kansas. This is intended to convey all my personal property of every description, and wherever located, except my insurance policies and the articles and things in my present residence in Emporia, Kans. Out of the proceeds I wish the following disposition made, 1st, to Elizabeth Halderman for whatever I may owe her, 2nd to protect W. Martindale and H. C. Whitley on the H. L. Liebfried bond, 3rd to pay W. Martindale for all paper in which he and I are individually and severally interested, and 4th, any residue to be applied to my debts to the 1st Nat. Bank of Emporia, Kans.

S. C. CROSS.

To have and to hold, all and singular the said goods and chattels, forever; and the said grantor hereby covenant- with the said grantee that he is the lawful owner of the said goods and chat-els; that they are free from all incumbrances; that he has good right to sell the

same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 14th day of July, A. D. 1898.

C. S. CROSS.

Executed in presence of—

——— ———.

177 Ex. "E."

Know all men by these presents that in consideration of one dollar and other valuable consideration the receipt of which is hereby acknowledged I do grant, sell, transfer and deliver to W. Martindale, his heirs, executors, administrators and assigns the following goods and chattels. All of my cattle about 300 head more or less located in Lyon Co., Kansas. All of my personal property and interests at or near Galena, Kansas. And all the remainder of my personal property whatever found, excepting only my policies of life insurance and the contents of my present residence in Emporia, Lyon Co., Kansas. This mtge. or bill of sale is intended to cover first an indebtedness of $3600.00 owing by me to Elizabeth Halderman, 2nd any damages that may result to H. C. Whitley or W. Martindale upon a certain bond given H. L. Leibfried and 3rd to cover all moneys which I owe W. Martindale as principal or joint endorser on paper.

To have and to hold the same all and singular the said goods and chattels forever. And the said grantor hereby covenants with the said grantee that he is the lawful owner of said goods and chattels; that they are free from all incumbrances, that he has good right to sell the same as aforesaid and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever. In witness whereof the said grantor has hereunto set his hand this 14th day of July, 1898.

C. S. CROSS.

Ex. "F."

EMPORIA, KANSAS, 3/2, '97.

C. S. Cross, Esq.:

The two notes of $10,000 each made by W. J. Ryan,—one held in St. Louis and the other by 1st Nat. Bank of Emporia, Ks., are my personal obligations and I hereby agree to protect the same.

Yours truly, W. MARTINDALE.

Ex. "G."

EMPORIA, KANSAS, 10/25/1894.

C. S. Cross, Esq.

DEAR SIR: It is expressly understood that upon the note of W. J. Ryan for 10000 dated Oct. 24th, payable at 1st nat. bank, N. Y., and by them discounted and which bears the endorsement of Martindale & Cross, W. Martindale and C. S. Cross that I, W. Martin-

dale, am the real maker and payer of said note; that W. J. Ryan as principal simply gave the note for my accommodation and
178 that C. S. Cross the endorser is only an accommodation endorser for my sole use and benefit.

W. MARTINDALE.

(Found by K. W. Cross in private box July 10, 1899.)

Ex. "H."

KANSAS CITY, MO., *July* 13, 1898.

As a supplement to my letter of May 12, 1898, I wish to add the following knowing and believing that I am soon to visit my Maker:

Mr. Leibfried has no interest whatever in my herd of cattle and never has had. I owe Mr. McHardy about $2800.00 and do not owe him for any interest in the three head of cattle in dispute.

Endeavoring to get out of heavy indebtedness owed by myself and my father's estate has only resulted in getting me deeper in the mire. As I have before stated, I have systematically deceived Mr. Martindale, the remainder of the board, the cashier and the employees. The accumulation of heavy interest and of losses has gradually but surely swamped me. The Emporia Republican Co., the Salina Gas Co., S. Nation's account, something like $35000 in Galena and various other smaller matters have been enough to swamp me twice over. The Galena matter is the only one for which I have — directly responsible, the others I inherited. If my cattle are sold at anything like a decent value, they should realize $50,000 and perhaps 75, or 80,000. The present bitter fight that has been made against the bank's credit has been pushed and forwarded by Major C. Hood and his satellites for business and political reasons. Jobes the bank examiner has done everything he could to help the matter along making statement- about the bank's condition to Hood and others which have been repeated on the street as coming from him.

The following notes are entirely fraudulent: John Fagan and mtg. 7000, J. A. Edwards & mtg. 9000.00, B. F. Williams and J. E. Waterhouse & mtg. 8500, L. W. Sutton & mtg. 8500.00, M. M. Mason & mtg. 10430.00. These are not forgeries, but the parties left them with me as president of the bank signed in blank expecting to use some money, but did not do so and I filled up the notes and used the proceeds for my personal benefit. They are not debts of these parties and never were. Note of J. M. Johnson for 11,400 to C. S. Cross belongs to John Stotler and I have used it to cover up a debt of my own.

C. S. CROSS.

179 Ex. H 2.

EMPORIA, KANSAS, *May 12th*, 1898—12 noon.

I desire to state the misfortunes of myself and the bank have been caused through my faults and errors. I inherited a large debt which I endeavored to meet by going into other schemes which

have all been practical failures and only got me deeper into the mire.

As to the bank matters I desire to say that I have carefully laid to deceive both the board of directors, the cashier and employees. Mr. Martindale will now learn for the first time how I have carefully deceived him, principally by way of substituted paper of which he has no knowledge. The reports and letters written the comptroller have been by me misrepresented to the board, they having signed on the last page and I having sent other letters than the ones read to them, changing every one but the last sheet. I have had a hard-luck story most of my lifetime,—the only pleasant feature being that of my present wife who has been a good and true woman.

Mr. Davis, our cashier, has never made an improper entry on the books and knows nothing of this whole miserable business. Death I do not fear—it is preferable to the agony of the past year. I know of nothing further to add except as to Mr. Martindale—this — a terrible thing for him for he has trusted me without reserve. I have given him a bill of sale of all my personal property.

C. S. CROSS.

Ex. "I."

Know all men by these presents, that in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged, I do grant, sell, transfer and deliver unto W. Martindale as trustee his heirs, executors, administrators, and assigns, the following goods and chattels, viz:

All of my personal property, of every kind and description and wherever located with the exception of my personal effects insurance policies and the contents of my house in Emporia, Lyon Co., Kansas.

To have and to hold, all and singular the said goods and chattels, forever, and the said grantor hereby covenant- with the said grantee that he (—) the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha- good right
180 to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

C. S. CROSS.

Executed in presence of

—— ——.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, } ss:

Under the provisions of section 884 of the Revised Statutes of the United States, I, Charles G. Dawes, Comptroller of the Currency, do hereby certify that the papers hereto attached are the original letters received at this office dated Aug. 2, 1898, signed by the president and two directors, and Aug. 3, 1898, signed by the vice-president,

from the First nat'l bank, Emporia, Kansas, and the whole of such originals on file and of record in my office.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents at the Treasury Department in the city of Washington and District of Columbia, this 20th day of January, A. D. 1900.

CHARLES G. DAWES,
Comptroller of the Currency.

Ex. J.

EMPORIA, KANSAS, *Aug.* 2, 1898.

Comptroller of the Currency, Washington, D. C.

SIR: In answer to your favor of the 22d ult. would say,

1st. Past-due paper largely consists of items which we regard as demand, interest being credited at regular periods. We will as suggested put this paper in live form and it will be greatly reduced in a short time. We will give this matter our promptest attention.

2nd. As to direct liability of Martindale & Cross as payers, I really cannot see how Mr. Forman figured it? There was no note of Mr. Martindale in the bank for any sum great or small. There was a note of Martindale & Cross for 5389.86 and an overdraft for the same parties of 2885.30 which later has since been made good. As to the Eureka Bank note and check, there was to the credit of that bank on their open account 8196.40—the $5000 check had been charged to their a/c and the 10,000.00 note has since been paid. Check of W. Martindale 50000.00 on Madison was sent to that bank and
181 by them credited to us. W. Martindale trustee for $1000.00 is secured to Mr. M. by about 15,000 worth of clear real estate. The original amount of this note was for 8000.00. This bank is also secured by more than enough collateral notes to take up the 1000.00 note. The Excelsior Water Mill Co. is not owned by W. Martindale, but is an incorporated company, Mr. N. it is true being the largest stockholder holding 13,000 of the $25,000 stock. This company's buildings and machinery are new and modern and have cost over 35,000 within the last two years and they have on hand about $20,000 of wheat and flour.

The note of Thos. Cross endorsed by C. S. Cross is an accommodation endorsement as far as Mr. C. S. Cross is concerned, he never having enjoyed any benefit from the matter whatever. 8500.00 of the H. C. Cross estate paper is secured by collateral and the estate is entirely and surely solvent. The note of S. K. Cross also belongs to the Cross estate and is endorsed by H. C. Cross and not by C. S. Cross. Both S. K. Cross and H. C. Cross are dead. The legal time for closing the H. C. Cross estate will be in Octo., 1898, at which time an entire closing of the matter will be had and without loss to the bank. The Lomond Co. note of 10,000 has been reduced to 5000.00 by Mr. Cross, that being his proportion of the paper. The other portion has been extended still holding Mr. Cross as endorser. The H. L. Leibfried note has been paid by Mr. Cross. Our present position in the matter would therefore be this—Martindale & Cross

is erroneous as 26550.72, Eureka bank 15000.00 and cash item 5000.00 on Madison have been paid. Cross items have been reduced 10000. Excelsior Water Mill Co. is a corporation and the amount due from them is not properly chargeable to Mr. M. In further addition would say that Mr. Cross has been offered 40000 for some cattle (which are free and clear) but upon our advice refused to sell for the figure as they are easily worth 10 to 25 M more money and negotiations are now in course with two other parties on a 65000 basis and we believe the cattle will be sold at that price or near it within the next 30 days if not sooner. Matter of Excelsior Co. has not really been increased, but is by reason of two examiners regarding the paper from two different standpoints as it is signed in two ways—one "Excelsior W. M. Co." the other "W. Martindale mill a/c" by making comparison with Mr. Jobes' memo. I think you will find the totals have been reduced. The H. C. Cross estate matter is in the same category—8500.00 was signed by H. C. Cross prior to his death. The remainder is signed "C. S. Cross, ex'r of the estate of H. C. Cross, deceased." The total of J. A. 182 Moore notes and overdraft have not been increased, the overdrafts previously existing having been put in the form of notes. We are endeavoring to negotiate a loan for him which will reduce his matter to the limit—he is easily worth 50 to 60,000 in first-class property.

Emp. Rep. Co. owns a clear business property (3-story brick bdg.) and it is certainly worth more than the amount named at force sale. C. V. Eskridge shows that he owns something like $35000 in clear property Salina Gas Co. has not been increased—perhaps Mr. Jobes did not include the 1858.04 note in his list. McHardy & Co. will be reduced within a very short time say 30 days. This was given for Sattle. M. M. Mason is an excess only by reason of the interest which was added in and made a part of the principal. I am sure that Mr. Forman will agree to the Martindale & Cross paper being either erroneous in amount or a reduplication.

4th. We are endeavoring to reduce the R. E. as rapidly as possible—on May 1st it was $29,061.38; Aug. 1st it was 22805.42. We are anxious to get this off our books and are bending every energy, in that direction. We have transferred the 10 M R. E. mtg. from other R. E. to loans and discounts and have credited L. & D. $575.72 to other R. E. leaving the "other R. E." balance tonight $21,381.14.

Instruments of conveyance for L. Willis, C. L. Greishaar, J. B. Moore, E. J. Ratcliff, A. M. Eidson, J. D. Harden, D. G. Bill and H. M. Poorman were all on record but at the time the examiner was here were mislaid.

Matter of legal reserve will be attended to. This is our hardest time of year just before all our cattle (*more,*) but they will begin to go to market after the 15th of this month and we believe you will find that our October statement has always been a good one.

6th. As to overdraft items of May 5, 1898, the matter of fact is that 10189.29 was absorbed by the fact that in different a/cs belonging to the same parties one would have a balance more than sufficient to make good the overdraft on the other. A balance between

these items was struck for the statement. As to the 55000 item it was included in C/D thus giving exactly the proper debit.

As no doubt the department is aware we have been subjected to the most bitter and malignant attacks—anonymous letters to our customers, newspapers in-uendos and every means and methods of bushw-ackers. We know and feel that we are able to meet
183 all attacks, but we must crave the indulgence of the department. The large personal and real holdings of the president and vice-president, will be devoted towards increasing the strength of the bank. All the personal and real property of the vice-president is free and clear in every respect; and barring two undivided interests in R. E. the property of the president is entirely clear—the two interests referred to have most excellent equities and the mtgs. on same have been given for balance of purchase-money. As you will notice over 60 % of the stock is held by the pres't and V. P. and they are the parties most vitally interested. As we explained previously we have been desirous of cutting down our surplus to 20000—this was always intended to reduce our taxes (4½ %) and while we cannot agree with the examiner as to losses, yet we have no desire to contest the question and if the department will kindly bear with us until the regular meeting in January, 1899, we will at that time charge off $80,000.

Resp'y, C. S. CROSS, *Pres't.*

O K.
WM. MARTINDALE.
R. D. THOMAS.

MADISON, KANS., *Aug.* 3, 1898.

Hon. Comptroller of Currency, Washington, D. C.

DEAR SIR: As to your favor of July 22nd, 1898, I would say that the answer made under date of Aug. 2nd, 1898, meets with my approval.

Respectfully, H. F. MARTINDALE.

Endorsement: File No. C. No. 1915. First nat'l bk., Emporia, Kans. Date Aug. 2/3 1898. Subject: Reply to office letter of July 22nd.

Indorsed: No. 7681. Stenographer's report of testimony. Filed Mar. 22, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH ET AL., Defendants. } Decree.

Now on this March 22nd, 1900, the above-entitled cause upon the original bill and the cross-bills and intervening petitions filed by the various parties therein came on to be heard. Complainant and the cross-complainant The First National Bank of New York
184 appeared by E. W. Cunningham and T. F. Garver, their solicitors; Morton Albaugh, receiver, by I. E. Lambert, by

Buck & Spencer and Madden Bros., his solicitors; F. C. Newman administrator by Buck & Spencer and Madden Bros., his solicitors; Ford Harvey, intervener, by Frank Hagerman his solicitor, and Wm. Martindale in person and by L. B. Kellogg, his solicitor.

The proofs consisting of the written testimony on file, written stipulations of parties also on file, and the oral testimony of Wm. Martindale, C. S. Jobes, Mrs. Cross, Morton Albaugh, John Madden and I. E. Lambert, transcribed and filed herein, were submitted to the court, which being fully advised in the premises finds:

That Morton Albaugh as receiver of the First National Bank of Emporia, Kansas, upon his cross-bill filed March 21st, 1900, is entitled to the fund arising from the sale of the Sunny Slope property to wit: the sum of $53,396.89 now on deposit in the Emporia National Bank of Emporia, Kansas, under and pursuant to the stipulation, a copy of which is attached to the amended bill of complaint, marked Exhibit E; and that said Morton Albaugh is the official successor of C. S. Jobes in said stipulation mentioned.

It is, therefore, considered, adjudged and decreed that F. C. Newman, administrator of the estate of C. S. Cross, deceased, surrender to said Morton Albaugh, receiver, all claim to said fund in said bank, and that said Morton Albaugh as receiver shall take and have exclusive possession and control of all said fund, and pursuant to the duties of his said trust shall pay out and disburse the same according to law; but this shall not be done if within sixty days from this date an appeal be taken by any party hereto until said appeal shall be finally decided.

The original bill, all intervening petitions and cross-bills, excepting the said cross-bill of Morton Albaugh are hereby dismissed; and the complainant, The Fourth National Bank of St. Louis and the First National Bank of New York, are hereby directed within — days hereof to pay the costs of this cause, taxed at $——

JNO. A. WILLIAMS,
U. S. District Judge, East. Dist. Ark., Holding Court in the Dist. of Kansas by Assignment.

Indorsed: No. 7681. Decree. Filed March 22, 1900. Geo. F. Sharitt, clerk.

185 In the Circuit Court of the United States for the District of Kansas.

FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH ET AL., Defendants.
} Decree.

This cause coming on to be heard before me the undersigned, upon the application to have the compensation of W. N. Smelser, special examiner, fixed, after being duly advised in the premises, it appears to the court that said special examiner has expended for stenographer's fees and for attendance of witnesses, the sum of fifty-eight dollars and forty cents, it further appearing that said special

examiner's services in taking testimony in said case are reasonably worth the sum of $250.

It is therefore ordered and decreed, that Morton Albaugh, receiver of the First national bank, and F. C. Newman, administrator of the estate of C. S. Cross, deceased, pay to the said W. N. Smelser, out of the funds now in their possession the sum of fifty-eight and $\frac{40}{100}$ dollars together with the sum of $191.60, the amount heretofore mentioned as services for said special examiner in all the sum of $250.

Given under my hand this 19 day of April, 1900.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

Indorsed: No. 7681. Order. Filed April 30, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.
} No. 7681. In Equity.

The above-named complainant, The Fourth National Bank of St. Louis, the cross-complainant, The First National Bank of New York, and the intervener, Ford Harvey, conceiving themselves, and each of them, aggrieved by the decree made and entered on the 22nd day of March, 1900, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors which is filed herewith, and they, and each of them, pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

E. W. CUNNINGHAM,
T. F. GARVER,
Solicitors for the Fourth National Bank of St. Louis and the First National Bank of New York.
FRANK HAGERMAN,
Solicitor for Intervener Ford Harvey.

And now, to wit, on May 14th, 1900, it is ordered that the appeal be allowed as prayed for.

AMOS M. THAYER,
Circuit Judge.

186 In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.
No. 7681. In Equity.

Assignment of Errors.

And now on the 14th day of May, 1900, come The Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervener, and jointly and severally say that in the record and proceedings in the above-entitled cause, and in the decree therein, there is error against all and each of said parties as follows:

1st. In holding that The Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervener, were not entitled to the proceeds of the C. S. Cross property, under the bills of sale given by said C. S. Cross to W. Martindale, trustee, on July 15, 1898, and November 15, 1898, respectively, and in decreeing said proceeds to the receiver of the First National Bank of Emporia;

2nd. In holding that the bill of sale given by C. S. Cross to W. Martindale, as trustee, under date of March 4th, 1898, was given as security for indebtedness to the First National Bank of Emporia for any greater sum than $7500.00.

3rd. In permitting counsel for the receiver of the First National Bank of Emporia, to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting on cross-examination, the testimony of the witness with reference to such bill of sale, and the matters connected therewith, as follows:

"96 Q. Mr. Martindale, did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

—. ——.

97. Q. Did you receive a bill of sale prior to the July bill of sale?

A. Yes, sir.

98 Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.

187 99 Q. Look it over and tell the court if that is what you received?

A. That would be my best judgment.

100 Q. When did you receive that?

A. Early in March.
101 Q. Perhaps the date of it?
A. I would think so.
102 Q. What did he say?
A. He said he wanted to use $7500.00 in the Leibfried matter and he wanted to make a mortgage or bill of sale to cover the amount."

4th. In admitting the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh, as receiver, claimed the proceeds of said property, as follows:

"Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh, you may now state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (in) March 4th, and if so, state fully what that conversation was?
A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said th-t he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.
2 Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?
A. I am quite sure he did not.

Cross-examination:

3 Q. Did you state when that was?
A. I could not give the exact date this conversation took place.
4 Q. It was since this suit was commenced?
A. Yes."

5th. In overruling the motion of complainant and others to strike out the aforesaid testimony of the witness, Morton Albaugh, as to bill of sale of March 4th, 1898.

6th. In admitting the testimony of I. E. Lambert as to statements made by Martindale, after the commencement of this suit, concerning the bill of sale of March 4th, 1898, as follows:

"10 Q. Now, what did he say, if he said anything, about what that (the March 4, 1898, bill of sale) was given for?
188 A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope

business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'

11 Q. Did he name any amount?

A. No, sir.

12 Q. Was the amount of $7,500.00 mentioned at all?

A. It was not.

13 Q. Were you giving intent interest and attention to what he was saying?

A. Yes, sir."

7th. In overruling the motion of complainant and others to strike out the aforesaid testimony given by the witness, I. E. Lambert, as to bill of sale of March 4th, 1898.

8th. In admitting the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

"Q. State whether you had any conversations with William Martindale, since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch?

A. Yes, I did.

Q. State those conversations in your own way, telling as best you now can, what led up to them, and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing?

A. The Monday morning after the bank closed, I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe, and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out, and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00, and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line, and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of
189 the stock, and he said he thought it would pay out more than that, probably get $50,000.00 for it, and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars, and you will get that very soon and then with the good paper, that I know must be good, and then with my property behind that, too, that is unencumbered, there is no question but what you will get your money, and you will get it if I have to go without a home and wear old clothes.' This is — substance my conversation with him. I went away feeling very well satisfied.

Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so, in relation to what

he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors?

A. I asked him the question, if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming into the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence and the other which you locate as about April of the present year and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

A. Yes. He said he had nothing to — with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe.' He did not have no cinch on the Slope business, had nothing to do with the Slope business, never did, and with his own property he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch?

A. No."

9th. In admitting the testimony of C. S. Jobes as to declaration and statements by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

10th. In admitting the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale
190 after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same?

A. Well, we had a committee meeting about February 23rd in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two or three times their liabilities; that the bank would get all of the proceeds of Sunny Slope, and that he had so many acres of land unincumbered that he was willing to put in and that we would get 100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why we would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000 or $55,000, something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

11th. In admitting the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes, sir, a number of conversations.

Q. You may state any conversation that you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

A. Why, at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said, I have property and I don't think you people are going to lose very much.

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told him I thought that probably could not be done now, and he
191 said he thought it could, and I think the man would still take the stuff. I think $41,000 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope would realize (*was*), what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

12th. In admitting the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank

failed? If so, state the time and the conversation as nearly as you can recall it?

A. Well, I think I had a talk with him about a week or ten days after the bank closed, a few days afterwards I met him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there and he said the Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land, he had, I think, several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

13th. In admitting the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes, sir.

Q. If so, please state where that conversation occurred and the substance of it?

A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me, Mr. Charles Johnson, and he told us we need not worry about our money. He thought we would get dollar for dollar, and went on to state what all they had, various lands, mines, &c. He spoke about the Sunny Slope business. Said the proceeds of
192 that sale would come right into the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not."

14th. In finding that any sum was still due and owing from the C. S. Cross estate to the receiver of said The First National Bank of Emporia, by reason of any indebtedness which said bill of sale of March 4th, 1898, was given to secure.

15th. In dismissing the bill of the Fourth National Bank of St. Louis.

16th. In dismissing the cross-bill of the First National Bank of New York.

17th. In dismissing the intervening petition of Ford Harvey.

Wherefore, The Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervenor, jointly and severally pray that said decree be reversed, and that the said court be directed to enter a decree in accordance with the prayers of the bill of complaint, cross-bill of the First National Bank of New York, and intervening petition of Ford Harvey.

E. W. CUNNINGHAM,
GARVER & LARIMER,
Solicitors for Fourth National Bank of St. Louis and First National Bank of New York.
FRANK HAGERMAN,
Solicitor for Ford Harvey.

T. F. GARVER, *Of Counsel.*

Indorsed: No. 7681. Fourth National Bank of St. Louis *vs.* Morton Albaugh, receiver, *et al.* Petition for appeal and assignment of errors. Filed May 14, 1900. Geo. F. Sharritt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant, *vs.* MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.	No. 7681. In Equity.

Assignment of Errors.

Now comes The First National Bank of New York, cross-complainant, and says that in the record and proceedings in the above-entitled cause, and in the decree therein, there is error against it as follows:

193 1st. In holding that the Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervener, were not entitled to the proceeds of the C. S. Cross property, under the bills of sale given by said C. S. Cross to W. Martindale, trustee, on July 15th, 1898, and November 15th, 1898, respectively, and in decreeing said proceeds to the receiver of the First National Bank of Emporia.

2nd. In holding that the bill of sale given by C. S. Cross to W. Martindale, as trustee, under date of March 4th, 1898, was given as security for indebtedness to the First National Bank of Emporia for any greater sum than $7500.00.

3rd. In permitting counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with reference to such bill of sale, and the matters connected therewith as follows:

"96 Q. Mr. Martindale, did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

—. ——.

97 Q. Did you receive a bill of sale prior to the July bill of sale?
A. Yes sir.
98 Q. Have you that bill of sale with you, now in your hands?
A. Yes, it is the one or one just like it.
99 Q. Look it over and tell the court if that is what you received.
A. That would be my best judgment.
100 Q. When did you receive that?

A. Early in March.
101 Q. Perhaps the date of?
A. I would think so.
102 Q. What did he say?
A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

4th. In admitting the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh as receiver claimed the proceeds of said property, as follows:

"Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh, you may now state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (in) March 4th, and if so, state fully what that conversation was.

194 A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

2 Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?
A. I am quite sure he did not.

Cross-examination:

3 Q. Did you state when that was?
A. I could not give the exact date this conversation took place?
4 Q. It was since this suit was commenced?
A. Yes."

5th. In overruling the motion of complainant and others to strike out the aforesaid testimony of the witness, Morton Albaugh, as to bill of sale of March 4th, 1898.

6th. In admitting the testimony of I. E. Lambert as to statements made by Martindale after the commencement of this suit, concerning the bill of sale of March 4th, 1898, as follows:

"10 Q. Now, what did he say, if he said anything, about what that (the March 4, 1898 bill of sale) was given for?
A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and

I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'

11 Q. Did he name any amount?

A. No sir.

12 Q. Was the amount $7500.00 mentioned at all?

A. It was not.

13 Q. Were you giving intent interest and attention to what he was saying?

A. Yes sir."

7th. In overruling the motion of complainant and others to strike out the aforesaid testimony given by the witness I. E. Lambert as to bill of sale of March 4th, 1898.

8th. In admitting the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

"Q. State whether you had any conversations with William Martindale, since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch?

A. Yes I did.

195 Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing?

A. The Monday morning, after the bank closed, I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a great deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00 and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then with the good paper, that I know must be good and then with my property behind that too that is unencumbered, there is no question but what you will get your money and you will get it if I have to go without a home and wear old clothes.' This is (—) substance (—) my conversation with him. I went away feeling very well satisfied.

Q. If you can make it plainer by coming nearer to just giving

the words used by Mr. Martindale, please do so in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors?

A. I asked him the question, if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence, and the other which you locate at about April of the present year, and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

196 A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe." He did not have no cinch on the Slope business, had nothing to do with the Slope business, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch?

A. No."

9th. In admitting the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

10th. In admitting the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same?

A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two or three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unincumbered that he was willing to put in and that we would get 100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why we would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000 or $55,000 something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

A. He did not say anything about any bill of sale. He just talked

like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

11th. In admitting the testimony of George Plumb, as to conversation with W. Martindale, as follows:

197 "Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes, sir, a number of conversations.

Q. You may state any conversation that you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

A. Why at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said I have property and I don't think you people are going to lose very much.

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told him I thought that probably could not be done now, and he said he thought probably it could, and, I think, the man would still take the stuff. I think $41,000.00 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope would realize *was*, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

12th. In admitting the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank failed? If so, state the time and the conversation as nearly as you can recall it?

A. Well, I think I had a talk with him about a week or ten days

after the bank closed, a few days afterwards I met him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there and he
198 said the Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

13th. In admitting the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes, sir.

Q. If so, please state where that conversation occurred and the substance of it?

A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me Mr. Charles Johnson, and he told us, we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had, various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right into the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not."

14th. In finding that any sum was still due and owing from the C. S. Cross estate to the receiver of said The First National Bank of Emporia, by reason of any indebtedness which said bill of sale of March 4th, 1898, was given to secure.

15th. In dismissing the cross-bill of the First National Bank of New York.

Wherefore, The First National Bank of New York, cross-complainant, prays that said decree be reversed, and that the said court be directed to enter a decree in accordance with the prayers of its said cross-bill.

E. W. CUNNINGHAM,
GARVER & LARIMER,
Solicitors for the First National Bank of New York.

T. F. GARVER, *Of Counsel.*

Indorsed: No. 7681. Fourth National Bank of St. Louis *vs.* M. Albaugh, receiver *et al.* Assignment of errors by First National Bank of N. Y. Filed May 14, 1900. Geo. F. Sharitt, clerk.

199 In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants. } No. 7681. In Equity.

Assignment of Errors.

Now comes Ford Harvey, intervenor, and says that in the record and proceedings in the above-entitled cause and in the decree therein, there is error against him as follows:

1st. In holding that The Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervenor, were not entitled to the proceeds of the C. S. Cross property, under the bills of sale given by said C. S. Cross to W. Martindale, trustee, on July 15th, 1898, and November 15th, 1898, respectively, and in decreeing said proceeds to the receiver of the First National Bank of Emporia.

2nd. In holding that the bill of sale given by C. S. Cross to W. Martindale, as trustee, under date of March 4th, 1898, was given as security for indebtedness to the First National Bank of Emporia for any greater sum than $7500.00.

3rd. In permitting counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with reference to such bill of sale, and the matters connected therewith, as follows:

"96 Q. Mr. Martindale, did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

—. —.

97 Q. Did you receive a bill of sale prior to the July bill of sale?
A. Yes sir.
98 Q. Have you that bill of sale with you, now in your hands?
A. Yes, it is the one or one just like it.
99 Q. Look it over and tell the court if that is what you received?
A. That would be my best judgment.
100 Q. When did you receive that?
A. Early in March.
101 Q. Perhaps the date of it?
A. I would think so.
103 Q. What did he say?

200 A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

4th. In admitting the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh, as receiver claimed the proceeds of said property, as follows:

"Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh, you may now state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (*in*) March 4th, and if so, state fully what that conversation was?

A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

2 Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?

A. I am quite sure he did not.

Cross-examination:

3 Q. Did you state when that was?

A. I could not give the exact date this conversation took place.

4 Q. It was since this suit was commenced?

A. Yes."

5th. In overruling the motion of complainant and others to strike out the aforesaid testimony of the witness, Morton Albaugh, as to bill of sale of March 4th, 1898.

6th. In admittiug the testimony of I. E. Lambert as to statements made by Martindale after the commencement of this suit, concerning the bill of sale of March 4th, 1898 as follows:

10 Q. Now, what did he say, if he said anything, about what that (the March 4, 1898 bill of sale) was given for?

A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, "I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank."

201 11 Q. Did he name any amount?

A. No sir.

12 Q. Was the amount $7500.00 mentioned at all?
A. It was not.
13 Q. Were you giving intent interest and attention to what he was saying?
A. Yes sir."

7th. In overruling the motion of complainant and others to strike out the aforesaid testimony given by the witness I. E. Lambert as to bill of sale of March 4th, 1898.

8th. In admitting the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

"Q. State whether you had any conversations with William Martindale, since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch?
A. Yes I did.
Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing?
A. The Monday morning, after the bank closed, I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00, and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then with the good paper, that I know must be good and then with my property behind that too that is unencumbered, there is no question but what you will get your money and you will get it, if I have to go without a home and wear old clothes.' This is (—) substance (—) my conversation with him. I went away feeling very well satisfied.
Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so, in relation
202 to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors.
A. I asked him the question, if there was any indebtedness, there

could possibly be any indebtedness that would come up that would hold this money and keep it from coming into the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence and the other which you locate at about April of the present year and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe.' He did not have no cinch on the Slope business, had nothing to do with the Slope business, never did and with his own property, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch?

A. No."

9th. In admitting the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

10th. In admitting the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so state what he said with reference to the same?

A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two or three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that (—) had so many acres of land unincumbered that he was willing to put in and that we would get 100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why we would get
100c. on the dollar, and we had quite an argument on that
203 question, and he figured out and said that Sunny Slope
would bring $50,000 or $55,000, something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't

talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

11th. In admitting the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes sir, a number of conversations.

Q. You may state any conversation that you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

A. Why at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said I have property and I don't think you people are going to lose very much.

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told him I thought that probably could not be done now, and he said he thought it could, and, I think, the man would still take the stuff. I think $41,000.00 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope would realize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

204 A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

12th. In admitting the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank failed? If so, state the time and the conversation as nearly as you can recall it?

A. Well, I think I had a talk with him about a week or ten days after the bank closed, a few days afterwards I met him near the opera-house, and I asked him about what he thought we were going

to get out of the proceeds of those cattle out there and he said the Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

13th. In admitting the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes, sir.

Q. If so, please state where that conversation occurred and the substance of it?

A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me, Mr. Charles Johnson, and he told us we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had, various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right into the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not."

14th. In finding that any sum was still due and owing from the C. S. Cross estate to the receiver of said The First National Bank of Emporia, by reason of any indebtedness which said bill of sale of March 4th, 1898, was given to secure.

15th. In dismissing the intervening petition of Ford Harvey.

205 Wherefore said Ford Harvey, intervenor, prays that said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayers of his said intervening petition.

FRANK HAGERMAN,
Solicitor for Ford Harvey.

Indorsed: No. 7681. Fourth National Bank of St. Louis *vs.* M. Albaugh, receiver etc. *et al.* Assignment of errors by Ford Harvey. Filed May 24, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. Louis, Complainant, *vs.* MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.	No. 7681.	In Equity.

Assignment of Errors.

Now comes The Fourth National Bank of St. Louis, complainant, and says that in the record and proceedings in the above-entitled cause, and in the decree therein, there is error against it as follows:

1st. In holding that The Fourth National Bank of St. Louis, complainant, The First National Bank of New York, cross-complainant, and Ford Harvey, intervenor, were not entitled to the proceeds of the C. S. Cross property, under the bills of sale given by said C. S. Cross to W. Martindale, trustee, on July 15th, 1898, and November 15th, 1898, respectively, and in decreeing said proceeds to the receiver of the First National Bank of Emporia.

2nd. In holding that the bill of sale given by C. S. Cross to W. Martindale, as trustee, under date of March 4th, 1898, was given as security for indebtedness to the First National Bank of Emporia, for any greater sum than $7500.00.

3rd. In permitting counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with reference to such bill of sale, and the matters connected therewith, as follows:

206 "96 Q. Mr. Martindale, did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

—. ——.

97 Q. Did you receive a bill of sale prior to the July bill of sale?

A. Yes, sir.

98 Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.

99 Q. Look it over and tell the court if that is what you received?

A. That would be my best judgment.

100 Q. When did you receive that?

A. Early in March.

101 Q. Perhaps the date of it?

A. I would think so.

103 Q. What did he say?
A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

4th. In admitting the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh, as receiver claimed the proceeds of said property, as follows:

"Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh, you may now state if you were in the room when Mr. Martindale had a conversation with regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (*in*) March 4th, and if so, state fully what that conversation was?
A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.
2 Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?
A. I am quite sure he did not.

Cross-examination:

3 Q. Did you state when that was?
A. I could not give the exact date this conversation took place.
4 Q. It was since this suit was commenced?
A. Yes."

5th. In overruling the motion of complainant and others to strike out the aforesaid testimony of the witness, Morton Albaugh, as to bill of sale of March 4th, 1898.

207 6th. In admitting the testimony of I. E. Lambert as to statements made by Martindale, after the commencement of this suit, concerning the bill of sale of March 4th, 1898 as follows:

"10 Q. Now, what did he say, if he said anything, about what that (the March 4, 1898 bill of sale) was given for?
A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'
11 Q. Did he name any amount?
A. No, sir.

12 Q. Was the amount $7500.00 mentioned at all?
A. It was not.
13 Q. Were you giving intent interest and attention to what he was saying?
A. Yes, sir."

7th. In overruling the motion of complainant and others to strike out the aforesaid testimony given by the witness I. E. Lambert as to bill of sale of March 4th, 1898.

8th. In admitting the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

"Q. State whether you had any conversations with William Martindale since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch?
A. Yes I did.
Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing?
A. The Monday morning after the bank closed, I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00, and then the depositors would get that and get it soon, if nothing
208 hindered the sale. Said Mrs. Cross is anxious for the sale to go on right along on this line and that Mrs. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars, and you will get that very soon and then with the good paper, that I know must be good, and then with my property behind that too, that is unencumbered, there is no question but what you will get your money and you will get it if I have to go without a home and wear old clothes.' This is (—) substance (—) my conversation with him. I went away feeling very well satisfied.
Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so, in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors?
A. I asked him the question, if there was any indebtedness, there

could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank. 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence and the other which you locate at about April of the present year and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe' he did not have no cinch on the Slope business, had nothing to do with the Slope business, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch.

A. No."

9th. In admitting the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

10th. In admitting the testimony of John Henning, as to conversation with W. Martindale, as follows:

209 "Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same?

A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two or three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unincumbered that he was willing to put in and that we would get 100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why we would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000 or $55,000 something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't

talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

11th. In admitting the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes sir, a number of conversations.

Q. You may state any conversations that you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

A. Why at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said I have property and I don't think you people are going to lose very much.

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

A. Well we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told him I thought that probably could not be done now, and he
210 said he thought that probably it could, and, I think, the man would still take the stuff. I think $41,000 is what he said they expected would be what would be gotten out of the balance of that stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope would realize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

12th. In admitting the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank failed? If so, state the time and the conversation as nearly as you can recall it?

A. Well, I think I had a talk with him about a week or ten days after the bank closed; a few days afterwards I met him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of these cattle out there and he said the

Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land; he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

13th. In admitting the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes, sir.

Q. If so, please state where that conversation occurred and the substance of it?

A. I had a conversation with him at the Whitley hotel, I judge about a week, after the failure of the bank and Mr. Johnson was with me, Mr. Charles Johnson, and he told us, we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right into the bank, said he did not see why we would not get all our money.

211 Q. Did he say anything to you about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not."

14th. In finding that any sum was still due and owing from the C. S. Cross estate to the receiver of said The First National Bank of Emporia, by reason of any indebtedness which said bill of sale of March 4th, 1898, was given to secure.

15th. In dismissing the bill of the Fourth National Bank of St. Louis.

Wherefore, The Fourth National Bank of St. Louis, complainant prays that said decree be reversed and that the said court be directed to enter a decree in accordance with the prayers of its said bill of complaint.

E. W. CUNNINGHAM,
GARVER & LARIMER,
Solicitors for the Fourth National Bank of St. Louis.

T. F. GARVER, *Of Counsel*

Indorsed: No. 7681. Fourth National Bank of St. Louis *vs.* M. Albaugh, receiver, &c., *et al.* Assignment of errors by complainant. Filed May 14, 1900. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States for the District of Kansas.

THE FOURTH NATIONAL BANK OF ST. LOUIS, Complainant,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased; The First National Bank of New York, Ford Harvey, H. C. Whitley, and William Martindale, Defendants.

No. 7681. In Equity.

Supersedeas Bond.

Know all men by these presents, that we, the Fourth National Bank of St. Louis, the First National Bank of New York, Ford Harvey, principals, and T. F. Garver, J. B. Larimer and W. M. Forbes, sureties, are held and firmly bound unto the above-named Morton Albaugh, receiver of the First National Bank of Emporia, F. C. Newman, administrator of the estate of C. S. Cross, deceased, and William Martindale, in the sum of one thousand dollars, to be paid to the said Morton Albaugh, receiver as aforesaid, F. C. Newman, as administrator as aforesaid, and William Martindale, for the payment of which well and truly to be made, we bind ouselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 12th day of May, in the year of our Lord nineteen hundred.

Whereas, the above-named The Fourth National Bank of
212 St. Louis, The First National Bank of New York and Ford Harvey, have prosecuted an appeal to the United States circuit court of appeals for the eighth circuit to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kansas, first division.

Now, therefore, the condition of this obligation is such, that if the above-named The Fourth National Bank of St. Louis, The First National Bank of New York, and Ford Harvey, shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE FOURTH NATIONAL BANK OF ST. LOUIS,
THE FIRST NATIONAL BANK OF NEW YORK,
By GARVER & LARIMER, *Their Att'ys.*
FORD HARVEY,
By FRANK HAGERMAN, *His Att'y.*
T. F. GARVER.
J. B. LARIMER.
W. M. FORBES.

Acknowledged before me this 12th day of May, 1900.
[SEAL.] GEO. F. SHARITT,
Clerk of U. S. Circuit Court, District of Kansas.

Approved May 14th, 1900.
AMOS M. THAYER,
Circuit Judge.

Indorsed: No. 7681. 4" Nat'l Bank of St. Louis *vs.* Morton Albaugh *et al.* Bond on appeal and supersedeas. Filed May 14, 1900. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings including the petition for appeal and assignments of errors in a certain cause in said court wherein The Fourth National Bank of St. Louis is complainant and Morton Albaugh, receiver of the First National Bank of Emporia, Kansas, and others are defendants, No. 7681.

I do further certify that the original citation is hereto attached and herewith returned.

Seal of the Circuit Court of the United States, District of Kansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 20 day of June, A. D. 1900.

GEO. F. SHARITT, *Clerk.*

(10 ten cents inter. rev. stamp.)

Filed Jul- 5, 1900.

JOHN D. JORDAN, *Clerk.*

213 (*Appearance for Appellant Ford Harvey.*)

And on the fifth day of July, A. D. 1900, an appearance of Mr. Frank Hagerman, as counsel for appellant Ford Harvey, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, *et al.* } No. 1455.

The clerk will enter my appearance as counsel for the appellant Ford Harvey.

FRANK HAGERMAN.

(Endorsed :) U. S. circuit court of appeals, eighth circuit. No. 1455. Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, rec'r &c. Appearance. Filed Jul- 5, 1900, John D. Jordan, clerk. Frank Hagerman, counsel for appellant Ford Harvey.

(*Appearance for Appellants.*)

And on the fifth day of July, A. D. 1900, an appearance of Mr. E. W. Cunningham, Mr. T. F. Garver and Mr. J. B. Larimer, as counsel for appellants, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

214 THE FOURTH NATIONAL BANK OF ST. LOUIS *et al.*, Appellants, *vs.* MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

The clerk will enter our appearance as counsel for the appellants.

E. W. CUNNINGHAM.
T. F. GARVER.
J. B. LARIMER.

(Endorsed :) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, etc., *et al.* Appearance. Filed Jul- 5, 1900, John D. Jordan, clerk. E. W. Cunningham, T. F. Garver, J. B. Larimer, counsel for appellants.

(*Appearance for Appellees.*)

And on the sixth day of October, A. D. 1900, an appearance of Mr. J. Jay Buck, as counsel for the appellees, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants, *vs.* MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

The clerk will enter my appearance as counsel for the appellees.

J. JAY BUCK.

(Endorsed :) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, etc., *et al.* Appearance. Filed Oct. 6, 1900, John D. Jordan, clerk. J. Jay Buck, counsel for appellees.

215 (*Appearance for Appellee Wm. Martindale.*)

And on the eighth day of October, A. D. 1900, an appearance of Mr. L. B. Kellogg, as counsel for appellee Wm. Martindale, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants, *vs.* MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

The clerk will enter my appearance as counsel for the appellee Wm. Martindale.

L. B. KELLOGG.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, etc., *et al.* Appearance. Filed Oct. 8, 1900, John D. Jordan, clerk. L. B. Kellogg, counsel for appellees.

(*Appearance for Appellees.*)

And on the eighth day of October, A. D. 1900, an appearance of Mr. John Madden and Mr. D. Madden, as counsel for the appellees, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants, *vs.* MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

216 The clerk will enter *my* appearance as counsel for the appellees.

JOHN MADDEN.
D. MADDEN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, etc., *et al.* Appearance. Filed Oct. 8, 1900, John D. Jordan, clerk. John Madden, D. Madden, counsel for appellees.

(*Appearance for Appellee William Martindale.*)

And on the eighth day of October, A. D. 1900, an appearance of Mr. Chas. B. Graves, as counsel for William Martindale, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants, vs. MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

The clerk will enter my appearance as counsel for William Martindale.

CHAS. B. GRAVES.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, etc., *et al.* Appearance. Filed Oct. 8, 1900, John D. Jordan, clerk. Charles B. Graves, counsel for appellees.

(*Appearance for Appellees.*)

And on the sixteenth day of October, A. D. 1900, an appearance of Mr. I. E. Lambert and Mr. W. L. Huggins, as counsel for appellees, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

217 United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants, vs MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

The clerk will enter *my* appearance as counsel for the appellees.

I. E. LAMBERT.
W. L. HUGGINS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, *et al.* Appearance. Filed Oct. 16, 1900, John D. Jordan, clerk. I. E. Lambert, W. L. Huggins, counsel for appellees.

(*Order of Submission.*)

And on the tenth day of December, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

MONDAY, *December* 10, 1900.

THE FOURTH NATIONAL BANK OF ST. LOUIS ET AL., Appellants,
vs.
MORTON ALBAUGH, Receiver, etc., *et al.* } No. 1455.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. T. F. Garver in behalf of the appellants; continued by Mr. I. E. Lambert and Mr. J. Jay Buck for the appellees and concluded by Mr. Frank Hagerman for the appellants.

Thereupon the cause was submitted to the court upon the
218 transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of April, A. D. 1901, an opinion of said United States circuit court of appeals for the eighth circuit was filed in said cause, in the words and figures following, to wit:

219 United States Circuit Court of Appeals, Eighth Circuit.

THE FOURTH NATIONAL BANK OF ST. Louis *et al.*, Appellants,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia, *et al.*, Appellees. } No. 1455, December Term, A. D. 1900.

Appeal from the circuit court of the United States for the district of Kansas.

Mr. Frank Hagerman and Mr. T. F. Garver (Mr. E. W. Cunningham was with them on the brief) for the appellants.

Mr. I. E. Lambert and Mr. J. Jay Buck (Mr. W. L. Huggins and Mr. Samuel S. Spencer were with them on the brief) for the appellees.

Before Caldwell, Sanborn, and Thayer, circuit judges.

This is a controversy between Morton Albaugh, receiver of the First National Bank of Emporia, Kansas, on the one hand, and the Fourth National Bank of St. Louis, Missouri, and the First National Bank of New York and F. Harvey on the other, respecting the ownership of a certain fund now in the possession of said receiver. The controversy arises in this way: When a receiver was appointed

for the First National Bank of Emporia the two banks aforesaid (hereafter referred to as the St. Louis bank and the New York bank) held notes amounting to about $40,000 which were either made or indorsed by C. S. Cross and William Martindale. Harvey also held a note for $10,000 which was signed by Cross and indorsed by Martindale. Cross was president of the First National Bank of Emporia, but he committed suicide about the time that the bank was placed in the hands of a receiver. Martindale was vice-president of the bank. Cross was the owner of a large amount of unincumbered live stock and personal property on what was known as his Sunny Slope farm near Emporia, Kansas. After the death of Cross, and on or about November 16, 1898, Martindale as is claimed took possession of the property, doing so, as it is also claimed, under
220 and by virtue of the following bills of sale, which had been executed by Cross in his lifetime:

"For and in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do hereby sell, transfer and assign to W. Martindale as trustee all my personal property of every kind and description and wheresoever located, except the contents of my house where I am now living in Emporia, Lyon county, Kansas, and excepting all my policies of life insurance. This sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to $8375 and interest, which does not include this $4500 Davis and Cross note.

"The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs and horses now on Sunny Slope farm, Lyon county, Kansas, together with all other personal property thereon or on farms adjoining, also all notes, stocks and bonds and mortgages, excepting as before stated those securing my indebtedness to my mother Sue S. Cross.

"The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon county court, after that he is to pay himself for any paper upon which he and I are mutually makers or indorsers. The balance if any to be paid the First National Bank of Emporia, Kansas, for all matters I owe them.

"Given under my hand and seal this 15th day of July, 1898.

"C. S. CROSS."

"EMPORIA, KANSAS, *Nov.* 15, 1898.

"For one dollar and other valuable consideration, the receipt of which is hereby acknowledeged, I hereby sell, transfer and assign unto W. Martindale and his assigns all my right, title and interest to the following personal property located in Emporia township, Lyon county, Kansas, and upon what is known as Sunny Slope farm, and the leased lands thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc., and all other personal property located thereon, whether specifically described hereon or not. Given under my hand and seal the date above written.

"C. S. CROSS."

Prior to the execution of the aforesaid instruments and on March 4, 1898, Cross had executed another bill of sale in favor of Martindale, which was as follows:

"Bill of sale of personal property.

"Know all men by these presents, that in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz: all of my personal property of every kind and description and wherever located with the exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon county, Kansas.

"To have and to hold, all and singular, the said goods and chattels, forever; and the said grantor hereby covenant- with the said grantee that he is the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha- good right to sell the same as aforesaid, and that he will warrant and de-
221 fend the same against the lawful claims and demands of all persons whomsoever.

"In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

"C. S. CROSS."

The receiver claimed, and such was the fact, that Cross in his lifetime had borrowed from the First National Bank of Emporia a large sum of money for his personal use in conducting the cattle business on his Sunny Slope farm and that the bill of sale of date March 4, 1898, was made for the purpose of securing the repayment of the money which he had thus borrowed. The two banks above mentioned, to wit: the St. Louis bank and the New York bank, and F. Harvey, claimed, in substance, that prior to July 18, 1898, an agreement had been entered into between William Martindale and C. S. Cross that the notes held by the three last named parties should be paid by Cross because the debts evidenced thereby as between him and Martindale were the individual debts of Cross; that for the purpose of securing to said Martindale the performance of that agreement, the bill of sale of date July 15, 1898, and the bill of sale of November 15, 1898, were executed; and that both of said bills of sale were given in good faith by Cross to Martindale and by him accepted with the design on the part of both that they should operate as a chattel mortgage to secure the last-mentioned indebtedness to the two banks aforesaid and to Harvey. Owing to this controversy concerning their respective rights to the fund which might be realized from the sale of the live stock and personal property on what was known as the Sunny Slope farm, the parties entered into a stipulation to the effect that the property in controversy should be sold as soon as possible and that after the expenses of making the sale and caring for the live stock had been deducted, the net proceeds should be treated as representing the property from which it had been derived and that

the several parties interested in the fund and claiming the same on the respective grounds heretofore stated, should interpose their respective claims, for adjudication, without being regarded as having waived any of their rights by virtue of the sale of the property. Such claims having been duly preferred by the respective parties in a form which need not be here stated in detail, and the testimony in support of the several claims having been heard and considered, the lower court sustained the contention of the receiver and awarded the fund, then amounting to $53,396.89, to the receiver, to be disbursed by him according to law. C. S. Jobes was the receiver of the First National Bank of Emporia who was at first appointed by the Comptroller of the Currency and who entered into the aforesaid stipulation. Morton Albaugh, the present receiver, is his successor in office. From the decree in favor of the receiver, last above mentioned, the the St. Louis bank and the New York bank and F. Harvey have appealed.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

The trial court appears to have found in accordance with the contention of Albaugh, the receiver of the First National
222 Bank of Emporia, that the bill of sale dated March 4, 1898, which is quoted above in the statement, was executed by C. S. Cross in favor of William Martindale, who at the time was vice-president of the First National Bank of Emporia, as trustee for said bank, to secure the payment of a very large sum of money which Cross then owed to said bank. And the principal question which the present record presents is whether there was any legal evidence to sustain such a finding. Three disinterested witnesses testified on the trial that on a certain occasion Martindale, in whose favor all the bills of sale aforesaid were executed, had admitted or stated to them that when Cross executed and delivered to him the first bill of sale, to wit: the one dated March 4, 1898, he said to him, in substance, that he had used a large amount of the money of the First National Bank of Emporia, of which he, Cross, was president; that he expected to use more of its money in running his Sunny Slope farm, and that he executed the bill of sale for the purpose of protecting or securing the bank. It is claimed, however, in behalf of the appellants that these admissions or statements of Martindale were improperly admitted in evidence; that they should have been excluded, and that if excluded, there is a dearth of evidence to sustain the decree of the lower court. As bearing upon this contention it is to be observed that when the Fourth National Bank of St. Louis interposed its claim to the fund in controversy in the form of a bill of complaint, it made the First National Bank of New York, F. Harvey and William Martindale parties defendant to said complaint as well as Morton Albaugh, receiver, and F. C. Newman, who was the administrator of C. S. Cross, deceased. The New York bank answered the complaint of the St. Louis bank by admitting all the allegations therein contained and joining with the complainant in its prayer for relief. Martindale, by his answer, also admitted all of

the allegations of the complaint, but further averred that the notes held by the St. Louis bank and the New York bank represented the individual debts of Cross, he being a mere surety for their payment. Martindale accordingly joined in the prayer for relief which was made by the two banks aforesaid and asked that the fund now in controversy which had been realized from the sale of the stock on the Sunny Slope farm might be appropriated to the payment of the notes held by said banks because of the execution by Cross of the two bills of sale aforesaid dated, respectively, July, 15, 1898 and November 15, 1898. It will be seen, therefore, that the issue raised by the pleadings was whether in virtue of the two bills of sale, Martindale was entitled to the fund in controversy for the purpose of paying his own obligations which were held by the two banks, and F. Harvey, or whether the receiver was entitled to the fund by virtue of the earlier bill of sale, dated March 4, 1898. It will also be seen that Martindale, Harvey, and the two banks claimed the fund by the same title and that as between them there was a complete identity of interest. To sustain the issue on their part Martindale was accordingly called as a witness for the purpose of proving the execution and delivery of the two bills of sale upon which they relied, dated July 15, 1898, and November 15, 1898, and the circumstances attending their execution. On his cross-examination the bill of sale of March 4, 1898, was produced and identified and the delivery thereof at the date of its execu-
223 tion was established. Martindale was then asked what was said by Cross contemporaneously with the delivery of the latter instrument, and in reply to such interrogatory he testified that Cross "said he wanted to use $7500 (of the bank's money) in the Liebfried matter, and he wanted to make a mortgage or bill of sale to cover that amount." He was then asked if he had not previously stated in the presence of various persons whose names were mentioned, that Cross said to him, in substance, when he delivered the bill of sale of March 4, 1898, that he had been using large sums of the bank's money for the benefit of his Sunny Slope farm and that he would have to use more money for the same purpose and that he executed the bill of sale for the purpose of securing the bank for such advances. His reply to this question was, that *he did not think* that he made such a statement to the persons named at the time and place stated in the cross-interrogatory; but he did not otherwise deny making such a statement. The various persons referred to were subsequently called as witnesses in behalf of the receiver, each of whom testified that Martindale had made such statements to them. Their testimony was to the effect heretofore stated.

It is urged in behalf of the appellants that the receiver made Martindale his own witness by asking him on his cross-examination what Cross said with respect to the bill of March 4, 1898, when the same was delivered to him; that he was accordingly bound by the statement of Martindale to the effect that it was given to secure the $7500 used in the Liebfried matter; and that he was not entitled to contradict this statement of Martindale by showing that he had pre-

viously given an entirely different account of what was said by Cross when the bill of sale of March 4, 1898, was executed and delivered. We think that this contention on the part of learned counsel for the appellants entirely overlooks the facts to which we have heretofore adverted, namely: that Martindale was himself a party to the action and that as between himself and the two banks, as well as between himself and F. Harvey, the other claimant, who also held a note of Cross which was indorsed by Martindale—there was a complete identity of interest. It will be observed that the bill of sale dated July 15, 1898, which is the one on which the appellants place their chief reliance, purports to have been made for the protection of Martindale; that is to say, to save him from liability on a certain bond and "to pay himself for any paper which he and Cross had made and indorsed." Harvey and the two banks had no right to or interest in the property conveyed to Martindale which they or either of them could assert, except such as they could assert through Martindale on the principle of subrogation. If Martindale was entitled as against the receiver to appropriate the fund in controversy to the payment of his own obligations which were held by Harvey and the two banks, then, and not otherwise, *they* were entitled to insist that he should exercise this right for their benefit and advantage as well as for his own. In view of these facts we are of opinion that it was competent for the receiver to inquire of Martindale on his cross-examination concerning the bill of sale of March 4, 1898; that by so doing the receiver did not make Martindale his own witness in any such sense as to be concluded by his statements;

224 and that it was competent for the receiver to show afterwards, as against all of the parties who claimed adversely to him, the admissions which Martindale (a party to the suit, and the one in whom the adverse right to the fund was vested primarily) had made in the presence of several persons, to the effect that the conveyance of March 4, 1898, was made to him as trustee for the First National Bank of Emporia to secure whatever indebtedness Cross then owed to the bank, or might afterwards owe to it. We think that whatever objections may have been made to such testimony, even if it be conceded that they were made in such a form as to be reviewed by this court, were properly overruled.

In behalf of the receiver it is contended that the decree below may be sustained upon the ground that the trial judge found that the two bills of sale upon which the appellants rely were never delivered by Cross to Martindale in the lifetime of the former and that they were therefore ineffective; but without entering into an investigation or a discussion of the evidence on that point, it is sufficient to say that for the reasons above stated we conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia and that from and after the execution of that instrument all of his personal property of every kind and description, except his personal effects, insurance policies and the contents in his house in Emporia, Kansas, stood pledged for that purpose.

The result is that the decree below was for the right party and the same should be *affirmed*. It is so ordered.

Filed April 3, 1901.

225 (*Decree.*)

And on the third day of April, A. D. 1901, in the record of the proceedings of said circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

WEDNESDAY, *April* 3, 1901.

THE FOURTH NATIONAL BANK OF ST. Louis, The First National Bank of New York, and Ford Harvey, Appellants,
vs.
MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased, and William Martindale.

No. 1455. Appeal from the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Morton Albaugh, receiver of the First National Bank of Emporia, F. C. Newman, administrator of the estate of C. S. Cross, deceased, and William Martindale have and recover against the Fourth National Bank of St. Louis, the First National Bank of New York and Ford Harvey the sum of twenty dollars for their costs herein and have execution therefor.

April 3, 1901.

226 (*Assignment of Errors.*)

And on the nineteenth day of June, A. D. 1901, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE FOURTH NATIONAL BANK OF SAINT Louis, The First National Bank of New York, and Ford Harvey, Appellants, vs. MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased, and William Martindale, Appellees.	In Equity.	No. 1455.

Assignment of errors.

Now come The Fourth National Bank of Saint Louis, The First National Bank of New York and Ford Harvey, appellants, and say that the judgment and decree in the above-entitled cause is erroneous and against the just rights of said appellants for the following reasons:

1st. In holding that William Martindale was a party to said action and was interested in such a manner that his interests were so identified with the interests of appellants that statements and declarations made by him were competent evidence against appellants to the prejudice of their claims.

2nd. In holding that the appellants could assert their claims to the fund in controversy only through William Martindale on the principle of subrogation.

3rd. In holding that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, under which the appellee Morton Albaugh, as receiver, claimed the fund in controversy, was made to secure all of the indebtedness of C. S. Cross to the First National Bank of Emporia and that by such bill of sale the fund in controversy stood pledged for that purpose.

4th. In affirming the decree of the circuit court and giving to Morton Albaugh, as receiver of the First National Bank of Emporia, all of the fund in controversy and the denying of appellants'
227 rights therein and claims thereto.

5th. In holding that it was not error for the trial court to permit counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with reference to such bill of sale, and the matters connected therewith, as follows:

"Q. Mr. Martindale did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross?

—. —.

Q. Did you receive a bill of sale prior to the July bill of sale?

A. Yes, sir.

Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.
Q. Look it over and tell the court if that is what you received?
A. That would be my best judgment.
Q. When did you receive that?
A. Early in March.
Q. Perhaps the date of —?
A. I would think so.
Q. What did he say?
A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

6th. In holding that it was not error for the trial court to admit the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh as receiver claimed the proceeds of said property, as follows:

"Direct examination.

By Mr. LAMBERT:

1 Q. Mr. Albaugh you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (in) March 4th, and if so, state fully what that conversation was?

228 A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation?
A. I am quite sure he did not.

Cross-examination:

Q. Did you state when that was?
A. I could not give the exact date this conversation took place.
Q. It was since this suit was commenced?
A. Yes."

7th. "In holding that it was not error for the trial court to admit the testimoney of I. E. Lambert as to statements made by Martindale after the commencement of this suit, concerning the bill of sale of March 4th, 1898, as follows:

"Q. Now what did he say, if he said anything, about what that (the March 4, 1898, bill of sale) was given for?
A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it re-

mained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'

Q. Did he name any amount?

A. No, sir.

Q. Was the amount $7500.00 mentioned at all?

A. It was not.

Q. Were you giving intent interest and attention to what he was saying?

A. Yes, sir."

8th. In holding that it was not error for the trial court to overrule motions of appellants to strike out the aforesaid testimony given by the witnesses Morton Albaugh and I. E. Lambert as to the
229 statements of William Martindale.

9th. In holding that it was not error to admit the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

"Q. State whether you had any conversations with William Martindale since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch?

A. Yes I did.

Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing?

A. The Monday morning after the bank closed I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal of stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00 and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said 'So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then with the good paper, that I know must be good, and then with my property behind that too that is unencumbered, there is no question

but what you will get it if I have to go without a home and wear old clothes.' This is (—) substance (—) my conversation with him.

I went away feeling very well satisfied.

230 Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors?

A. I asked him the question if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence, and the other which you locate at about April of the present year, and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank?

A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe.' He did not have no cinch on the Slope business, had nothing to do with the Slope business, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conversations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch?

A. No."

10th. In holding that it was not error for the trial court to admit in evidence the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

11th. In holding that it was not error for the trial court to admit the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale
231 after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same?

A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two and three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unencumbered that he was willing to put in and that we would — 100c. on the dollar. And then Johnson he asked him, kind of

questioned that, and he went on to Johnson why we would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000.00 or $55,000,00 something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property?

A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

12th. In holding that it was not error for the trial court to admit the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February?

A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned?

A. Yes sir, a number of conversations.

Q. You may state any conversation you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same?

A. Why at the time he said then, speaking about the
232 amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said, 'I have property and don't think you people are going to lose very much.'

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know?

A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told — I thought that probably could not be done now, and he said he thought probably it could, and, I think, the man would still take the stuff. I think $41,000.00 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope would realize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia?

A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property?

A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

13th. In holding that it was not error for the trial court to admit the testimony of Charles Johnson as to conversation with W. Martindale as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time the bank failed? If so, state the time and the conversation as nearly as you can recall it?

A. Well, I think I had a talk with him about a week or ten days after the bank closed, a few days afterwards I mer him near
233 the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there and he said the Sunny Slope money would be the bank's and would go to the depositors; and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

14th. In holding that it was not error for the trial court to admit the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank?

A. Yes sir.

Q. If so, please state where that conversation occur-ed and the substance of it?

A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me, Mr. Charles Johnson, and he told us we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had, various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right in to the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any encumbrance of any kind on the personal property at Sunny Slope?

A. Not to my knowledge he did not."

Wherefore, said appellants pray that the said judgment and decree of said circuit court of appeals and of said circuit court for the district of Kansas be reversed and that appellants be restored to all things which they have lost by reason of said decrees.

GARVER & LARIMER,
Solicitors for Appellants.

T. F. GARVER, *Of Counsel.*

234 (Endorsed:) #1455. The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, *et al.* Assignment of errors. Filed Jun- 19, 1901, John D. Jordan, clerk.

28—159

(*Petition for Allowance of an Appeal.*)

And on the twentieth day of August, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a petition for allowance of an appeal, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

THE FOURTH NATIONAL BANK OF SAINT Louis, The First National Bank of New York, and Ford Harvey, Appellants, *vs.* MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased, and William Martindale, Appellees.	In Equity.	No. 1455.

The above-named appellants conceiving themselves aggrieved by the decision and judgment made and entered, on the third day of April, 1901, in the above-entitled cause, affirming the decree of the circuit court of the United States for the district of Kansas, second division, and awarding to Morton Albaugh, as receiver of the First National Bank of Emporia, he having been thereto duly appointed by the Comptroller of the Currency, the sum of $53,396.89, and denying appellants' claim thereto, do hereby appeal from said decision and judgment to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith; and they pray that this appeal may be allowed and
235 that a transcript of the record, proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States. Said suit involved the right to said sum of money as between said Morton Albaugh, as such receiver, and said appellants, both of whom claimed the same.

GARVER & LARIMER,
Solicitors for Appellants.

T. F. GARVER, *Of Counsel.*

And now, to wit, on June —, 1901, it is ordered that the appeal be allowed as prayed for.

(Endorsed:) No. 1455. Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver &c., *et al.* Petition for allowance of an appeal. Filed Aug. 20, 1901, John D. Jordan, clerk.

(*Appeal Bond.*)

And on the twentieth day of August, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause an appeal bond, in words and figures following, to wit:

Know all men by these presents, that we, The Fourth National Bank of St. Louis and The First National Bank of New York as principals, and Frank A. Ruff of St. Louis, Mo., as surety, are held and firmly bound unto Morton Albaugh, as receiver of the First National Bank of Emporia in the full and just sum of five hundred dollars, to be paid to the said Morton Albaugh, as receiver, his certain attorney, executors, administrators, successor or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this first day of July, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the United States circuit court of appeals for the eighth circuit in a suit depending in said court, between The Fourth National Bank of St. Louis, The First National Bank of New York and Ford Harvey as appellants and Morton Albaugh, receiver, *et al.*, as appellees a judgment was rendered against the said The Fourth National Bank of St. Louis, The First National Bank of New York and Ford Harvey and the said The Fourth National Bank of St. Louis, The First National Bank of New York and Ford Harvey having obtained an appeal and filed a copy thereof in the
236 clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Morton Albaugh, as receiver, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Fourth National Bank of St. Louis, The First National Bank of New York and Ford Harvey shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FOURTH NATIONAL BANK OF ST. LOUIS,
By H. A. FORMAN, *2d V. P.* [SEAL.]
FRANK A. RUF. [SEAL.]
FIRST NATIONAL BANK OF N. Y., [SEAL.]
By GARVER & LARIMER, *Solicitors.*

Sealed and delivered in presence of—
G. A. W. AUGST.
G. A. W. AUGST.

Approved by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

July 10th, 1901.

I hereby certify that the surety on within bond is sufficient for the amount of the bond.

AMOS M. THAYER,
U. S. Circuit Judge, 8th Circuit.

(Endorsed:) Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver, *et al.*, appellees. Appeal bond. Filed Aug. 20, 1901, John D. Jordan, clerk.

(*Citation.*)

And on the twentieth day of August, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a citation, the original of which, with proof of service endorsed thereon, is hereto attached and herewith returned.

237 The United States of America to Morton Albaugh, receiver of the First National Bank of Emporia, F. C. Newman, administrator of the estate of C. S. Cross, deceased, and William Martindale, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States thirty days from and after the day this citation bears date, pursuant to an appeal filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein The Fourth National Bank of Saint Louis, First National Bank of New York, and Ford Harvey are appellants, and you are respondents, to show cause, if any there be, why the judgment and decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 12th day of August, A. D. 1901.

DAVID J. BREWER,
Associate Justice U. S. Supreme Court.

238 [Endorsed:] No. —. Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver etc. *et al.* Citation. Filed Aug. 20, 1901. John D. Jordan, clerk.

U. S. Marshal's Return.

Received the within citation this 12th day of August 1901 at Topeka, Kansas, and executed the same on August 12, 1901, at Topeka, Kansas, by delivering to Morton Albaugh receiver of the First National Bank of Emporia Kansas a true and correct copy thereof.

Fees, 2.00.

W. E. STERNE,
U. S. Marshal,
By J. E. BROWN, *Deputy.*

Within citation served August 13, 1901, at Emporia, Kansas, by delivering a true and correct copy thereof to each of the within-named, F. C. Newman, administrator of the estate of C. S. Cross, deceased, and William Martindale; and also by delivering a true and

correct copy thereof to J. J. Buck appearing of record as one of the attorneys for said appellees.

W. E. STERNE,
U. S. Marshal,
By E. A. PRESCOTT, *Deputy.*

Marshal's Fees.

Service 3 persons	6.00
Travel, 61 miles, 6c	3.66
	9.66

239 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing two hundred and thirty-eight pages, contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals in the case of The Fourth National Bank of St. Louis, *et al.*, appellants, *vs.* Morton Albaugh, receiver of the First National Bank of Emporia, *et al.*, appellees, No. 1455, December term, 1900, as full and complete as the same remain on file and of record in my office.

I further certify that the original citation with the proof of service endorsed thereon, is hereto attached and herewith returned.

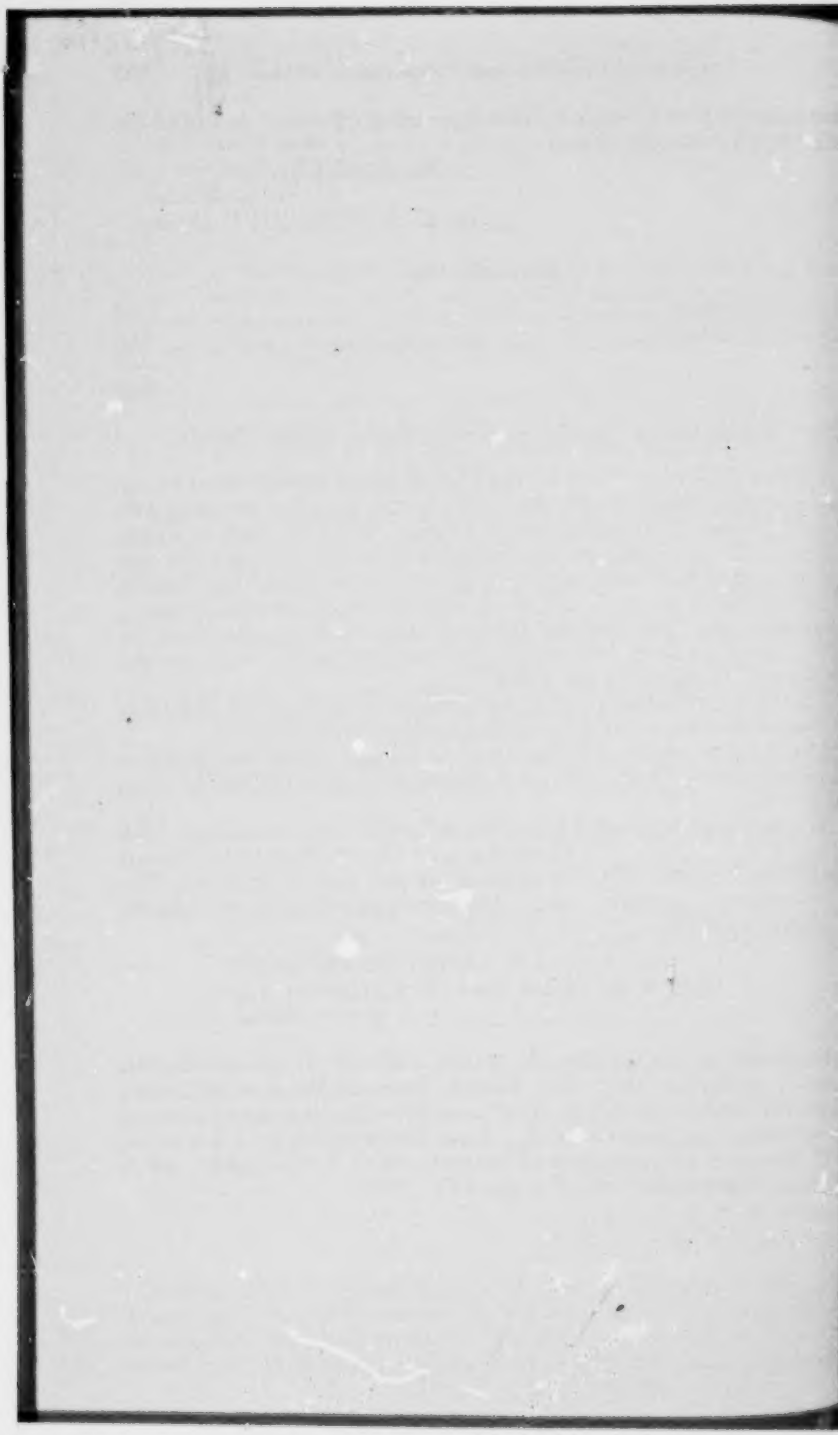
I do further certify that the mandate in said cause was issued to the circuit court for the district of Kansas on the fourth day of June, A. D. 1901.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-third day of August, A. D. 1901.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,258. U. S. C. C. of appeals, 8th circuit. Term No. 159. The Fourth National Bank of St. Louis, First National Bank of New York and Ford Harvey, appellants, *vs.* Morton Albaugh, receiver of the First National Bank of Emporia, F. C. Newman administrator of the estate of C. S. Cross, deceased & William Martindale. Filed August 31", 1901.



FILE COPY.

JAN 15 1908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908

No. [redacted] Docket No. [redacted]

[redacted]

APPELLANTS,

vs.

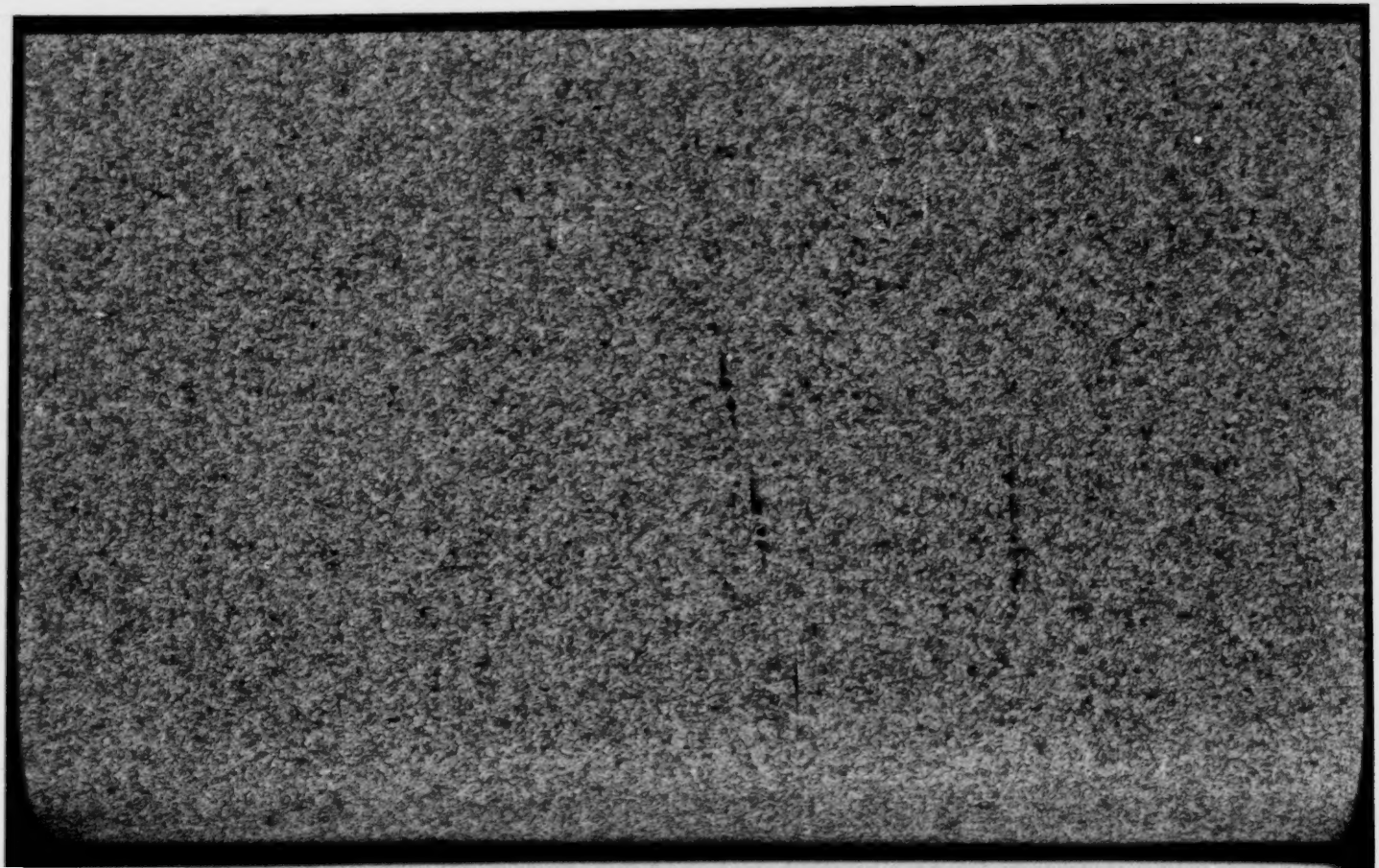
[redacted]

APPELLEES.

BRIEF FOR APPELLANTS.

[redacted]

Attorneys for Appellants.



1869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 18258. Term No. 159.

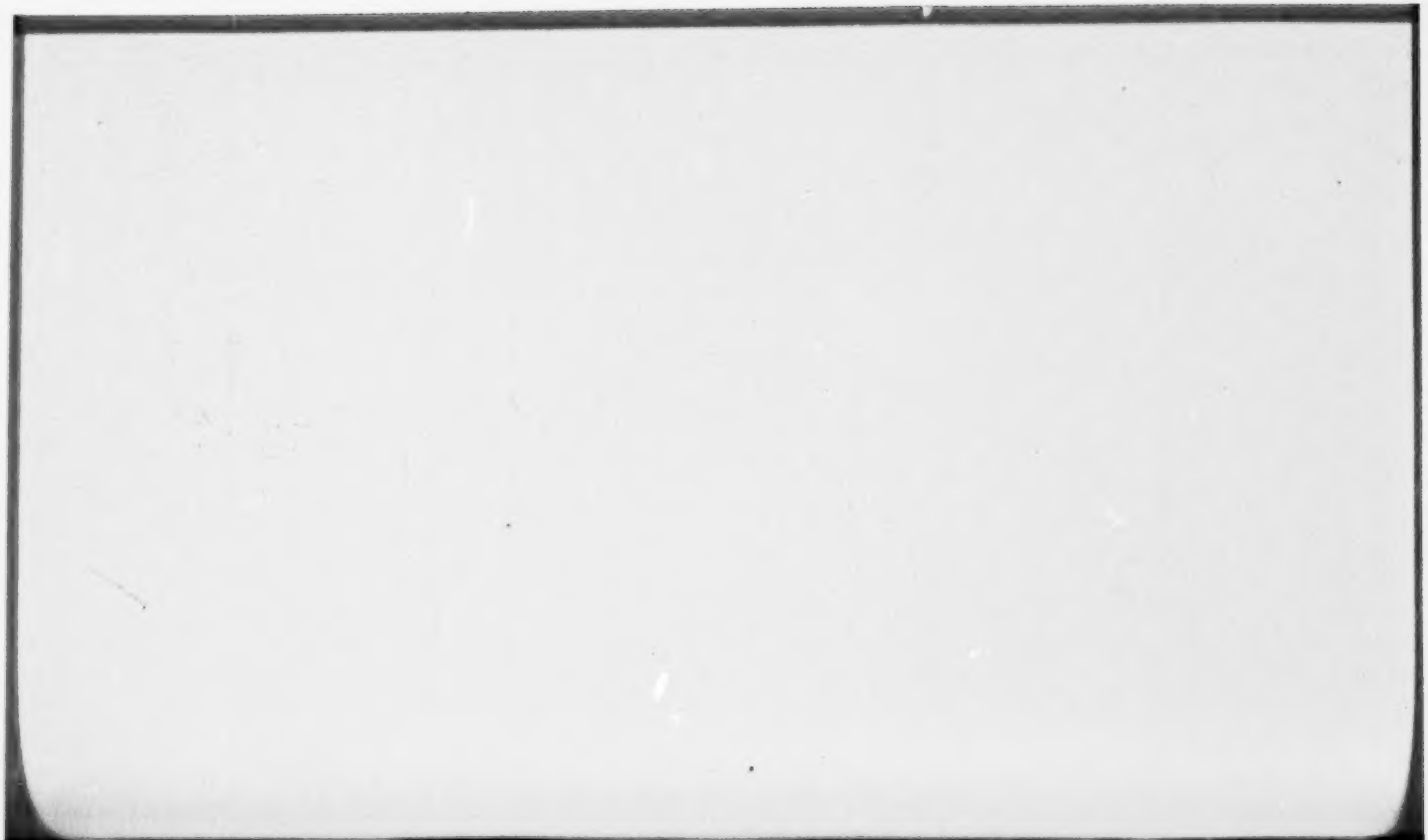
THE FOURTH NATIONAL BANK OF SAINT LOUIS, FIRST NATIONAL BANK OF NEW YORK, and FORD HARVEY,
APPELLANTS,

vs.

MORTON ALBAUGH, Receiver First National Bank of Emporia, F. C. NEWMAN, Administrator of the Estate of C. S. Cross, Deceased, and WILLIAM MARTINDALE,
APPELLEES.

BRIEF FOR APPELLANTS.

T. F. Garver,
J. B. Larimer,
Frank Hagerman,
C. N. Sterry,
Attorneys for Appellants.



STATEMENT OF CASE.

This is a controversy between the Fourth National Bank of St. Louis, the First National Bank of New York, and Ford Harvey, upon the one side, and Morton Albaugh, as Receiver of the First National Bank of Emporia, Kansas, upon the other side, over the right to a fund of $53,396.89, on deposit in the Emporia National Bank of Emporia, Kansas, to the credit of the receiver, to abide the final determination of this case. The history of this fund, and a statement of the claims, of the several parties to it, are, briefly, as follows:

From January 12, 1892, to November 16, 1898, C. S. Cross was President, and Wm. Martindale was Vice-President, of the First National Bank of Emporia, Kansas, organized under the National Banking Act. Cross committed suicide on November 16, 1898, and upon that date, under the direction of the Comptroller of the Currency, one Jobes closed the Bank, taking possession of it, and its assets as receiver; he continued as such receiver until February 16, 1899, when he was succeeded by Appellee Morton Albaugh. The Bank, Cross, and Martindale, were each wholly insolvent at the time of the suicide of Cross, but Martindale having no knowledge of the fact of his own insolvency, or of the insolvency of either of the others until afterwards, believed himself, the Bank and Cross, to be perfectly solvent at the date of the closing of the Bank. For more than a year previous to Cross's death, Cross had been indebted to the appellant, the First National Bank of New York, in the sum of $30,000.00, which was evidenced by notes, renewed from time to time, and signed by Cross and Martindale, and indorsed by each of them. During the same time Cross was indebted to the appellant, the Fourth National Bank of St. Louis, in the sum of $20,000.00, evidenced by notes, renewed from time to time, which were indorsed by Martindale and Cross. On July

30, 1898, Cross borrowed from Ford Harvey, of Kansas City, Missouri, $10,000.00, for which he gave his note of that date, payable in six months, with seven per cent. interest. This note was indorsed on the back by Mr. Martindale. All the above indebtedness was the personal indebtedness of Cross, and as between him and Martindale, Martindale was only a surety as to the same.

For a long time preceding his death, Cross was indebted, directly and indirectly, to the Bank, in sums ranging from two hundred, to three hundred thousand dollars, the latter being about the amount of such indebtedness at the time of his death. At the time of his death, and for a long time previous, Cross was the owner of a large amount of live stock, and personal property, that was kept on a farm near Emporia, Kansas, known as the Sunny Slope Farm. This property was entirely unincumbered, except such liens thereon as may have been created by either or all of the three certain written instruments hereafter referred to. In the Spring of 1898, trouble had arisen between Cross and one Leibfried, which culminated, in June of that year, in an action commenced by Leibfried against Cross, in the District Court of Lyon County, Kansas (the County in which Emporia was situated).

In this action Cross was required to execute a bond, with sufficient surety, to pay any judgment that might be rendered against him.

July 1st Cross gave the bond required, signed by himself as principal, and by Wm. Martindale and one H. C. Whitley as sureties. This bond was approved by the court. If Leibfried had been successful, the amount that he could have recovered on this bond might have equalled the sum of $7,500.00. This case was subsequently tried, in October of that year, and resulted in a verdict in favor of Cross, and was finally dismissed, on October 30, 1899, all liability on this bond ceasing at that date. On July 15th Cross executed an instrument in writing, set out in the amended bill of complaint as exhibit C of such bill (Pr. tr. pp. 14, 15), and which was exhibit C in evidence on the hearing. (Pr. tr. p. 167.)

The following is a copy of this instrument:

"For and in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged I do hereby sell, transfer and assign unto W. Martindale as trustee all my personal property of every kind and description and whatever located, except the contents of my house where I am now living in Emporia, Lyon Co., Kansas, excepting all my policies of life insurance—this sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to 8375.00 and int. which does not include the 4500 Davis & Cross note. The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs and horses, now located on Sunny Slope Farm, Lyon Co., Kansas, together with all other personal property thereon or on farm adjacent—also all notes, stock, bonds and mortgages (excepting as before stated those securing my indebtedness to my mother Sue S. Cross).

That said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon Co. court, after that he is to pay himself for any paper upon which he and I are mutual makers or endorsers. The balance if any to be paid to the First Nat. Bank of Emporia, Ks., for all matter I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. Cross."

On November 15, 1898, the day preceding Cross's death, he executed and delivered to Wm. Martindale another instrument in writing, attached to the amended bill as exhibit D, and read in evidence on the hearing as exhibit B. (Pr. tr. pp. 15 and 166.) A copy of which is as follows:

"Emporia, Kansas, Nov. 15, 1898.

For one dollar and other valuable considerations the receipt of which is hereby acknowledged, I hereby sell, transfer and assign unto W. Martindale or his assigns all my right, title and interest to the following personal property, located in Emporia Twp., Lyon county, Kansas, and upon what is known as Sunny Slope farm and the leased lands thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc. and also all other personal property located thereon whether specifically described herein or not.

Given under my hand and seal the date above written.

C. S. Cross."

At the time of Cross's death he had, as Manager of the Sunny Slope Farm, one Thomas Evans. Immediately after the death of Cross, Martindale informed Evans, that he had a bill of sale, of the stock, and asked him to keep charge, and care of it, the same as he had been doing, for his (Martindale's) account. This Evans agreed to do. A few days after this, Mr. Jobes, as receiver of the Bank, claiming that the Bank was the owner of the stock (by reason of Cross having fraudulently used the funds of the Bank to purchase this stock with), interviewed Evans, and told him that the Bank was the owner of the stock, and asked him to keep in charge of the stock for the Bank, which Evans also agreed to do. In the Summer and Fall of 1898, preceding his death, Cross had very extensively advertised the sale of his stock on Sunny Slope Farm (which consisted of very finely bred standard and grade Herefords) to take place at Kansas City on December 7, 1898. Immediately after Cross's death, one Fred Newmanwas appointed by the proper court administrator of his estate. At the time Martindale was claiming the right to this stock, under his bills of sale, and Jobes was claiming it as the property of the Bank, Newman, as such administrator, Ford Harvey and H. C. Whitley (the last two claiming through each of the above instruments in writing) were severally claiming the right of possession of this live stock, each asserting his claims to be superior to those of the others.

On November 29th each of these claimants, believing it to be for the best interest of all parties, to have the sale, which Cross had advertised, proceeded with, at the time and place advertised, entered into an agreement, in writing, as follows:

"November 29th, 1898.

Whereas, C. S. Jobes, receiver of the First National Bank of Emporia, Kansas, has taken possession of and claims the cattle and other personal property at Sunny Slope farm near Emporia, to be the property of said bank, and as such assets of said bank in his hands as such receiver, and

Whereas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, claims said cattle and other personal property on said farm, to be the property of said estate and as such assets of said estate, and

Whereas, Ford Harvey, H. C. Whitley, Wm. Martindale, and other parties claim to have certain rights in said cattle and other personal property by virtue of bill of sale thereof, made by said C. S. Cross to Wm. Martindale, and

Whereas, all parties in interest are satisfied that it is to the benefit of all to have the public sale of a portion of said cattle at Kansas City, heretofore planned by said C. S. Cross go on and take place on Dec. 7th, 1898 as advertised. It is now stipulated and agreed that said C. S. Jobes, receiver as aforesaid, shall make said sale and as soon as possible sell the balance of said cattle and other personal property upon said farm for as much money as it is possible for him to obtain for the same, and out of the proceeds of said sale deduct all actual and necessary expenses incurred heretofore and which may be necessary in making said sale, and expenses in feeding and caring for said cattle and other personal property until sold. That he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia National bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator, said net proceeds to be treated by all persons interested the same as though the cattle and other personal property were the subject-matter of litigation said funds to remain in said bank until a final decision is reached in the courts as to who the said funds belong to. It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle shall be prejudiced in any manner but that all of said rights shall (attached) to and be vested in the said net proceeds derived from the sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property, and the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto nor prevent the assertion of their rights to the net proceeds derived from the sale of said cattle and other personal property in any manner, in any court that they desire to assert their rights or could have asserted said rights to said cattle and other personal property, had they not been sold by said C. S. Jobes. It is hereby agreed in order that said cattle and other personal property may bring as much as possible and in order that there may not be any question raised as to title by purchaser, that said F. C. Newman as administrator, shall join

with the said Jobes and help sell said cattle and other personal property.

C. S. JOBES,
Receiver First National Bank of Emporia, Kansas.
F. C. NEWMAN,
Administrator of Estate of C. S. Cross, Dec'd.
L. B. KELLOGG and
CHAS. B. GRAVES,
Att'ys for Wm. Martindale.
E. W. CUNNINGHAM,
Att'y for H. C. Whitley.
WM. C. HOOK,
Att'y for Ford Harvey."

(Pr. tr. pages 83, 84.)

Pursuant to this agreement, the property was sold, and the net proceeds arising from the sale, amounting to the sum of $52,958.39, was deposited, in accordance with the terms of the agreement. (Pr. tr. pages 82, 83.) On February 28, 1898, the appellant, the Fourth National Bank of St. Louis, filed its bill of complaint, in the Circuit Court of the United States for the District of Kansas, against Morton Albaugh, as receiver of the First National Bank of Emporia, F. C. Newman, as administrator of the estate of C. S. Cross, deceased, the First National Bank of New York, Ford Harvey, H. C. Whitley and Wm. Martindale. Upon this bill of complaint, was an indorsement by Morton Albaugh, as receiver, F. C. Newman, as administrator of the estate of Cross, Wm. Martindale, H. C. Whitley and the First National Bank of New York, entering their several appearance in the action, and waiving the issuance and service of process therein. Subsequently, on April 10, 1898, the Bank filed an amended bill, (see pr. tr. pages 12 to 16, inclusive). The amended bill of complaint, set out in substance: the indebtedness of Cross to the complaint, in the sum of $20,000.00 upon certain notes; the fact that Martindale was an indorser upon and surety only as to such notes; that the bills of sale of Aug. 15 and Nov. 15 (which were plead in full as exhibits to the bill and amended bill) executed by Cross to Martindale pledged the property that was sold, to the payment of the indebtedness due to it upon

these notes, the indebtedness due from Cross to Ford Harvey and the First National Bank of New York, respectively, and the liability to Whitley, if any. The amended bill alleged that the receiver of the Bank was holding and claiming this fund as such receiver, and plaintiffs asked that its claim, the claim of the First National Bank of New York, and the claims of Ford Harvey and Whitley, be determined to be liens upon the fund, prior to any claim of the receiver thereon and that the fund be distributed *pro rata* to those parties. Newman, as administrator, filed an answer to the original and amended bills of complaint. (Pr. tr. pages 8 to 10, and 21 to 23.) Newman claimed, in his answer, that the instruments in writing, (above set out) executed by Cross to Martindale, were never *legally* delivered, and that they constituted no lien upon the property, out of which the funds in controversy were derived, and that Newman, as such administrator, was entitled to the entire proceeds (pr. tr. pp. 8, 9 and 21, 22). On April, 22, 1899, the First National Bank of New York filed its answer and cross-complaint. It, in substance, admitted and adopted the allegations contained in the amended bill of complaint, and alleged, that Cross was owing it, at the time of his death, $30,000.00, evidenced by a note upon which Martindale was an endorser, and that the property sold was pledged as security for the debt by the execution of the instruments referred to. (Pr. tr. pp. 17 and 18.) On the 28th of April, 1899, Martindale filed an answer, practically admitting the averments in the amended bill of complaint, but in addition thereto, alleging that the Union National Bank of Kansas City, Missouri, was the holder of a note for $10,000.00, which was secured by these instruments in writing, and alleging that it was a necessary party. (Pr. tr. pp. 18 and 19.) Newman filed a replication to the answer and cross-complaint of the First National Bank, and to the answer of Martindale (pr. tr. pages 23, 24), and also a supplementary answer, and amendment to the former answer, to the amended bill of complaint. (Pr. tr. pages 25, 26.) These were all the plead-

ings that were filed in the case, prior to March 21, 1900. On this last date, the case was dismissed, as to the defendant Ford Harvey, and leave was granted to him to file a petition of intervention, which was by him on the same day filed. (Pr. tr. pages 128 to 131.) The petition in intervention filed by Harvey claimed that there was due from Cross to Harvey $10,000.00, upon a promissory note upon which Martindale was endorser, and that the written instruments referred to, and attached to the amended bill as exhibits C and D were severally intended by Cross to secure this note as well as other notes and that the intervenor was entitled to a *pro rata* share of this fund through the security created by these bills of sale.

It further alleged that the matters set out in the bill of complaint, and in the cross-bill of the First National Bank, were true, and that Harvey, the Fourth National Bank of St. Louis and the First National Bank of New York, were entitled to receive the proceeds of the sale of the cattle *pro rata*, and that neither of the other parties had any interest in the fund. On the same date, March 21, 1900, by consent of all parties, Morton Albaugh, as receiver of the First National Bank, was permitted to file an answer to the amended bill of complaint, upon condition that each and every allegation contained in it should be understood as denied, by every other party to the action, without the filing of any formal replication. (Pr. tr. pages 131, 133 to 137.) The answer of Albaugh admitted that Cross at the time of his death was the owner of the property, from which the fund was derived, alleging, however, that, on the 4th of March, 1898, Cross, being indebted in a large amount to the First National Bank, desired to borrow from the Bank the additional sum of $50,000.00, and on that date, to secure all of his indebtedness to the Bank, executed and delivered to Martindale a bill of sale of the property from which the fund was derived, setting out a copy of the same as an exhibit. (Pr. tr. pp. 133 to 137.) The following is a copy of this instrument:

"BILL OF SALE OF PERSONAL PROPERTY.

Know all men by these presents, that in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz: all of my personal property of every kind and description and *what*ever located with the exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon county, Kansas.

To have and to hold, all and singular, the said goods and chattels, forever; and the said grantor hereby covenant– with the said grantee that he is the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha– good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

C. S. Cross."

(Pr. tr. pages 135, 136.)

The answer further alleged that Martindale, on account of having received this bill of sale, could not legally receive, or take the written instruments plead in complainant's amended bill of complaint, and that therefore the same were void, as against the claim of Albaugh, the receiver, through this bill of sale of March 4th. Previous to the filing of the intervening petition, and the answer of Albaugh, a large amount of testimony had been taken, by an examiner appointed by the court. (Pr. tr. pages 27 to 127, inclusive.) Very little of this testimony, so taken, is now of any materiality in the case. Upon March 22, 1900, the case was heard before the late John A. Williams, then United States District Judge for the Eastern District of Arkansas, who was holding the court in the District of Kansas. The case was heard upon the evidence taken before the examiner, the oral testimony of Wm. Martindale, C. S. Jobes, Mrs. Cross, Morton Albaugh, John Madden, I. E. Lambert, and certain exhibits, including those above referred to as the foundation of the several claims herein.

At the hearing the appellants placed Mr. Martindale upon the stand as a witness, to prove the execution of the bills of sale, shown by the amended bill, and the purposes for which the same were executed. (Pr. tr. pp. 136 to 139.) The court permitted the receiver (over the objections of appellants) to cross-examine Martindale, as to the bill of sale through which the receiver claimed, for the purpose of establishing the claim of the receiver. The court also permitted the receiver (over the further objections of appellants), after Martindale had testified on such cross-examination, that the bill of sale through which the receiver claimed was not executed by Cross for the purposes stated in the answer of the receiver, to give evidence as to statements made by Martindale, after this action was commenced, and the issues joined (not under oath, or in the presence of or with the knowledge of appellants), to the effect that the bill of sale, set out in the receiver's answer, was executed by Cross for the purposes stated in such answer. This testimony as to Martindale's declarations was the only proof given upon the hearing to support the allegations of the receiver's answer. Upon these declarations of Martindale alone the court determined all the issues in favor of Morton Albaugh, the receiver, and decreed that he was entitled, as such receiver, to the fund, amounting to $53,396.89, and that he should recover his costs. The decree dismissed the intervening petition of Mr. Harvey, the bill of complaint, and the answer and cross-bill of the First National Bank of New York, the answer and cross-bill of Newman, as administrator, and the answer and cross-bill of Martindale. (Pr. tr. pages 173, 174.) From this decree, the appellants herein appealed to the Circuit Court of Appeals for the Eighth Circuit, the assignments of error upon such appeal being practically the assignments of error upon this appeal. (Pr. tr. pages 175 to 205.) Subsequently, in April, 1901, the decree of the Circuit Court was affirmed by the judgment of the Circuit Court of Appeals. The opinion of the United States Circuit Court of Appeals, and its judgment, are

found on pages 205 to 211 of the printed transcript. (See 107 Fed. R., 819.) From this judgment of affirmance this appeal is prosecuted.

Neither Newman, Martindale nor Whitley appealed from the decree of the Circuit Court, to the Circuit Court of Appeals, or from the judgment of the Circuit Court of Appeals to this court.

SPECIFICATION OF ERRORS.

(Title of cause omitted).

The Circuit Court of Appeals in its consideration of this cause erred in the following particulars, to-wit:

1st. In holding that William Martindale was a party to said action and was interested in such a manner that his interests were so identified with the interests of appellants that statements and declarations made by him were competent evidence against appellants to the prejudice of their claims.

2nd. In holding that the appellants could assert their claims to the fund in controversy only through William Martindale on the principle of subrogation.

3rd. In holding that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, under which the Appellee Morton Albaugh, as receiver, claimed the fund in controversy, was made to secure all the indebtedness of C. S. Cross to the First National Bank of Emporia and that by such bill of sale the fund in controversy stood pledged for that purpose.

4th. In affirming the decree of the Circuit Court and giving to Morton Albaugh, as receiver of the First National Bank of Emporia, all of the fund in controversy and the denying of appellants' rights therein and claims thereto.

5th. In holding that it was not error for the trial court to permit counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with

reference to such bill of sale, and the matters connected therewith, as follows:

"Q. Mr. Martindale did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross? —. ———.

Q. Did you receive a bill of sale prior to the July bill of sale? A. Yes, sir.

Q. Have you that bill of sale with you, now in your hands? A. Yes, it is the one or one just like it.

Q. Look it over and tell the court if that is what you received? A. That would be my best judgment.

Q. When did you receive that? A. Early in March.

Q. Perhaps the date of ——? A. I would think so.

Q. What did he say? A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

6th. In holding that it was not error for the trial court to admit the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh as receiver claimed the proceeds of said property, as follows:

"DIRECT EXAMINATION.

By Mr. Lambert:

Q. Mr. Albaugh you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (*in*) March 4th, and if so, state fully what that conversation was? A. Mr. Martindale stated that at sometime in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation? A. I am quite sure he did not.

CROSS-EXAMINATION.

Q. Did you state when that was? A. I could not give the exact date this conversation took place?

Q. It was since this suit was commenced? A. Yes."

7th. In holding that it was not error for the trial court to admit the testimony of I. E. Lambert as to statements made by Martindale after the commencement of this suit, concerning the bill of sale of March 4th, 1898, as follows:

> "Q. Now what did he say, if he said anything, about what that (the March 4, 1898, bill of sale) was given for? A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'
>
> Q. Did he name any amount? A. No, sir.
>
> Q. Was the amount $7500.00 mentioned at all? A. It was not.
>
> Q. Were you giving intent interest and attention to what he was saying? A. Yes, sir."

8th. In holding that it was not error for the trial court to overrule motions of appellants to strike out the aforesaid testimony given by the witness Morton Albaugh and I. E. Lambert as to the statements of William Martindale.

9th. In holding that it was not error to admit the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

> "Q. State whether you had any conversations with William Martindale since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch? A. Yes, I did.
>
> Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing? A. The Monday morning after the bank closed I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make

me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00 and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then with the good paper, that I know must be good, and then with my property behind that too that is unencumbered, there is no question but what you will get it if I have to go without a home and wear old clothes.' This is (——) substance (——) my conversation with him. I went away feeling very well satisfied.

Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors? A. I asked him the question if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence, and the other which you locate at about April of the present year, and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank? A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe.' He did not have no cinch on the Slope business, had nothing to do with the Slope business, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conver-

sations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch? A. No."

10th. In holding that it was not error for the trial court to admit in evidence the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

11th. In holding that it was not error for the trial court to admit the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same? A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two and three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unencumbered that he was willing to put in and that we would ——100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why he would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000.00 or $55,000.00 something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property? A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

12th. In holding that it was not error for the trial court to

admit the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February? A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned? A. Yes, sir, a number of conversations.

Q. You may state any conversation you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same? A. Why, at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said, 'I have property and don't think you people are going to lose very much.'

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know? A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told ——— I thought that probably could not be done now, and he said he thought probably it could, and, I think, the man would still take the stuff. I think $41,000.00 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope woul drealize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia? A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property? A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

13th. In holding that it was not error for the trial court to admit the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time

the bank failed? If so, state the time and the conversation as nearly as you can recall it? A. Well, I think I had a talk with him about a week or ten days after the bank closed. A few days afterwards I met him near the opera house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there, and he said the Sunny Slope money would be the bank's and would go to the depositors, and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

14th. In holding that it was not error for the trial court to admit the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank? A. Yes sir.

Q. If so, please state where that conversation occurred and the substance of it? A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me, Mr. Charles Johnson, and he told us we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had, various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right in to the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any encumbrance of any kind on the personal property at Sunny Slope? A. Not to my knowledge he did not."

15th. The Circuit Court of Appeals erred in affirming the decree for affirmative relief, in favor of Morton Albaugh, as receiver of the Bank, upon the answer filed by Morton Albaugh, as such receiver, as no cross-bill, or petition in intervention, was filed by Albaugh, making anybody defendants, and asking for any affirmative relief, the only pleading filed by him being an answer.

POINTS OF LAW AND FACT.

FIRST POINT.

The Facts Established Upon the Hearing Material to the Specifications of Error.

I.

FACTS IN SUPPORT OF THE CLAIMS OF APPELLANTS WHICH WERE ADMITTED BY THE PLEADINGS OR PROVED UPON THE HEARING.

The amended bill of complaint specifically alleged that C. S. Cross, at the time of his death, long prior thereto, and on July 15, 1898, was the sole owner (without any encumbrance thereon except the encumbrances alleged in said bill), of the live stock from the sale of which the fund in controversy was produced. (Pr. tr. p. 11.) The appellant, the First National Bank of New York, specifically admitted this allegation in its answer. (Pr. tr. p. 17.) The intervening petition of Ford Harvey also alleged the ownership of this property by Cross. (Pr. tr. p. 128.) The answer of Albaugh, receiver, expressly admitted that Cross was the owner of this property at the time of his death, and that he was such owner on the 4th of March preceding his death. (Pr. tr. pp. 133-4.) The amended bill of complaint specifically alleged and set out, as exhibits C and D, the execution and delivery of the written instruments alleged in it to have been executed by Cross and delivered to Martindale on the 15th day of July, and the 15th day of November, 1898, through which it, and each of the other appellants, claim their several and respective rights to the fund in controversy.

(See exhibits C and D, pp. 14 and 15, and exhibits B and C, pp. 166, 167, pr. tr.) These two instruments are heretofore set out in the statement of facts.

These allegations of the amended bill, concerning each of these instruments, were admitted to be correct, and adopted by the appellant, the First National Bank of New York (Pr. tr. p. 17), and by the intervening petition of Harvey. (Pr. tr. p. 129.) The answer of Albaugh, as receiver, not only does not deny, the execution and delivery of these written instruments, or either of them, but practically admits their execution and delivery, as alleged in the amended bill, in its attempt to avoid their effect and validity, by alleging, in substance: that, owing to the execution of the bill of sale of March 4th, 1898 (attached as an exhibit D to the answer), Martindale could not legally receive, or take either of these subsequent bills of sale, and hence each of the same were void. (Pr. tr. p. 134.) The allegations seeking to avoid the effect of these bills of sale being mere allegations of conclusions, were of no force or effect.

Dillon v. Barnard, 21 Wall. 437;
U. S. v. Ames, 99 U. S. 45;
Mosher v. St. L. I. M. & S. R. R. Co., 127 U. S. 390;
Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 869.

These allegations of the answer, being made to avoid the effect of the written instruments plead in the amended bill, admit the execution and delivery of such instruments.

Clark v. White, 12 Peters, 178;
McCoy v. Rhodes, 11 How. 131;
Clements v. Nicholson, 6 Wall. 299;
Reed v. McAllister, 49 Fed. 16;
Lake Shore & M. S. R. Co. v. Felton, 103 Fed. 227.

In addition to these admissions, Mr. Martindale was orally examined, under oath, as a witness at the hearing, and testified to

the execution and delivery of each of these papers, and that the purpose for which the same were executed and delivered was that alleged in the pleadings of appellants (Pr. tr. pp. 137-8, 150), and this evidence was without any contradiction whatever.

If the court should hold that there was no admission of the execution and delivery of these instruments contained in the answer of the receiver, then as there is no denial in such answer, putting the same in issue, the evidence of the one witness, was sufficient to prove their execution and delivery.

Brown v. Pierce, 7 Wall. 211.

It was admitted upon the hearing (by stipulation signed by each of the parties), that Cross, on July 30, 1898, borrowed of Harvey ten thousand dollars, for which he gave a note that Martindale endorsed as surety for the accommodation of Cross, and that the note set out in the intervening petition was a true and correct copy of the note referred to. (Pr. tr. p. 131.)

It was also testified to by Martindale, and not contradicted, that the indebtedness to the First National Bank of New York, and to the Fourth National Bank of St. Louis, as alleged in their respective pleadings, was correct, and that he was surety for Cross upon such indebtedness. (Pr. tr. p. 147.) The facts concerning the action of Leibfried against Cross, material to this case, were agreed to by stipulation in writing and read in evidence on the hearing (Pr. tr. p. 161; see also bond, exhibit A, Pr. tr. 166), and are as set forth in the statement of the case hereinabove. It was further stipulated at the hearing, that the agreement for the sale of the cattle by the receiver, shown as exhibit E of the amended bill (Pr. tr. pp. 15-16), was signed November 28, 1898. Martindale further testified that the bill of sale of November 15, 1898, was to secure him as indorser upon the several notes held by the appellants. It was testified by Thomas Evans, who was in charge of this personal property for Cross at the time of his death, that on the afternoon of Mr. Cross's death Mr. Martindale told him to see that the

property was to be taken care of as usual, and that a few days later, at the home of Mr. Martindale, he stated to Evans that he had a bill of sale of all the stock on Sunny Slope, and that he wanted Evans to take charge of it, and care of it, as it had been taken care of before, and that the sale which had been advertised to take place should go on. Subsequently he told him the same thing. The witness testified that he followed these instructions. (Pr. tr. p. 167.)

It was therefore established upon the hearing, without any contradiction, that Cross, on July 15, 1898, and up to the date of his death, was indebted to the Fourth National Bank of St. Louis in the sum of twenty thousand (20,000) dollars, evidenced by certain notes, upon which Martindale was an accommodation indorser for Cross; and to the First National Bank of New York in the sum of thirty thousand (30,000) dollars, also evidenced by a note, upon which Martindale was also an accommodation endorser for Cross; that Cross had procured a bond to be given in the case of Leibfried against him, pending in the District Court of Lyon County, Kansas, to answer any judgment that Leibfried might obtain, which was signed by Martindale and Whitley; that while this indebtedness was owing, and the bond was a valid and subsisting one, he (Cross) being the owner of the property from the sale of which the fund in controversy was derived, executed and delivered the written instrument attached to the amended bill as exhibit C (Pr. tr. pp. 144, 167), above set out, whereby, for the purposes stated in said instrument, he pledged this property to Martindale, as trustee, to protect Martindale, and his co-surety, on the Leibfried bond, and to pay any notes on which Martindale was indorser, as surety for Cross; that on the 30th day of July following, Cross borrowed from intervenor Harvey ten thousand (10,000) dollars, on a note of that date, which was endorsed for Cross's accommodation by Martindale; that the day before Cross committed suicide (November 15), he executed and delivered to Martindale the paper shown by exhibit B of the evidence (Pr. tr.

p. 166), which was exhibit D of the amended complaint (Pr. tr. p. 147), to further secure the liability of Martindale, as his surety on each of the notes referred to, as severally held by the appellants; that the liability of Martindale and Whitley upon the bond referred to had ceased; that the property covered by these bills of sale was sold by the receiver under the stipulation made by the parties (Pr. tr. pp. 15, 16, 82 to 84), and the proceeds of the sale substituted in its place.

II.

MATTERS PROVED UPON THE HEARING, IN SUPPORT OF THE CLAIM OF ALBAUGH, AS RECEIVER OF THE FIRST NATIONAL BANK.

The bill of sale set out in the answer of Albaugh, and upon which his claim as receiver is based (Pr. tr. pp. 133, 136 (exhibit I, p. 170); heretofore set out in the statement of facts), was proved on the cross-examination of Martindale (over the objection of appellants) to have been executed by Cross and delivered to Martindale about the date of it, Martindale testifying the purpose for which Cross stated he executed and delivered such bill was that he, Cross, at that time wanted to use $7500.00 in the Leibfried case, and desired to make a mortgage, or bill of sale, to cover that amount. (Pr. tr. p. 144.) There was no testimony showing or tending to show that any money was at that time borrowed or taken from the bank by Cross, which this instrument might have secured.

The appellee Albaugh was then permitted (over the objection of appellants) to prove, by his own oral testimony, and that of Lambert, one of his attorneys, that after the commencement of this action, in the January following, and while the examiner was taking the evidence taken by him, Martindale, not wishing to testify before the examiner at that time, met Albaugh, and Albaugh's attorneys, and in a conversation with them Martindale

stated, in substance, that at the time of the execution of the bill of sale of March 4th Mr. Cross came into the bank, and gave him (Martindale) such bill of sale, stating that he (Cross) had used a large amount of the Bank's money, and was expecting to have to use more of it in the Sunny Slope business, and that he wanted to give this bill of sale, for the purpose of protecting the Bank, or to secure the Bank; that he then laid down the bill of sale upon Martindale's desk, where it remained until after the Bank failed. (Pr. tr. pp. 156, 159-60.) It was also testified by Albaugh, and his attorney, that this was the first time that either of them knew of this bill of sale of March 4th, and that it was shortly after obtaining this knowledge that the answer, which was filed for Albaugh, was prepared. (Pr. tr. pp. 158-9.) These statements were denied by Martindale, on his cross-examination by the receiver, and were permitted to be given (over the objections of appellants) to contradict and impeach Martindale as to such matters brought out on his cross-examination. (Pr. tr. pp. 144-5.) The receiver was also permitted (over the objection of appellants), to prove statements made by Martindale, after the failure of the Bank, to J. M. Johnson, John Henney, George Plumb and John Statler (Pr. tr. pp. 94, 106, 107, 109), to the effect that the Bank would receive the proceeds of the sale of the Sunny Slope Farm, and that he (Martindale) had no claim upon the same.

While it is stated, in the statement of the facts of the case made by the Circuit Court of Appeals, that the receiver claimed, and *that it was the fact*,—

> "that Cross in his lifetime had borrowed from the First National Bank of Emporia a large sum of money, for his personal use in conducting the cattle business on the Sunny Slope Farm, and that the bill of sale of date March 4, 1898, was made for the purpose of securing the repayment of the money which he had thus borrowed,"—

the Circuit Court of Appeals was clearly mistaken, as no such claim was made, and there was not a scintilla of evidence in relation to such a claim, beyond the statement of Albaugh and Lambert

as to the statements of Martindale concerning the statements of Cross, and the claims made by Jobes, as receiver, set out in the stipulation for the sale of this property, and made to Evans when Jobes claimed to take possession of the property. (Pr. tr. pp. 74, 103.) The only evidence as to the debt of Cross to the Bank, and how it occurred, is that of H. P. Clark, shown on pages 110 to 112, inclusive, of the record.

It therefore clearly appears, that while the bill of sale of March 4th was proved, the purposes for which it was given, as claimed by the receiver, was only established by declarations of Martindale (not under oath), made after the death of Cross. The most important of these declarations were made after the issues in this case were joined (except the issues made by the intervening petition, and the answer of Albaugh), and were not made under oath, or in the presence of, or assented to, by either of the appellants. Without these declarations, there was not *the slightest evidence* in the case, to establish the fact, that this bill of sale of March 4 was executed for the purpose of in any way securing the Bank, for any indebtedness owing to it by Cross, at the time of his death, and without these declarations there was a total failure to establish the material allegations of the answer of the receiver, of facts in avoidance of the claims of the appellants, or in denial thereof, or in support of the receiver's claim to the fund.

SECOND POINT.

The Circuit Court of Appeals erred in holding that the appellants had no right to, or interest in the property, conveyed to Martindale, by the bills of sale of July 15th, and November 15th, 1898, which they, or either of them, could assert, except such as they could assert through Martindale. (2nd specification of error.)

I.

The fundamental error committed by the Circuit Court of Appeals, is disclosed in the following extract from its opinion (the italics are ours):

> "We think that this contention on the part of the learned counsel for the appellants entirely overlooks the facts to which we have heretofore adverted, namely: that Martindale was himself a party to the action, and that as between himself and the two banks, as well as between himself and F. Harvey, the other claimant, who also held a note of Cross which was indorsed by Martindale—there was a complete identity of interest. It will be observed that the bill of sale dated July 15, 1898, which is the one on which the appellants place their chief reliance, purports to have been made for the protection of Martindale; that is to say, to save him from liability on a certain bond and 'to pay himself for any paper which he and Cross had made and indorsed.' *Harvey and the two banks had no right to or interest in the property conveyed to Martindale which they or either of them could assert, except such as they could assert through Martindale* on the principle of subrogation." (Pr. tr. p. 210.)

The proposition stated by the Circuit Court of Appeals, that the appellants had no right, or interest, in the property conveyed by the bills of sale of July 15th, and November 15th, which they, or either of them, could assert, except as the same was asserted through Mar-

tindale, is utterly opposed to those principles of equity, that are now almost universally recognized, as the principles which should govern in a case like the one at bar.

Under the principles of equity referred to, the execution of the bill of sale of July 15th, 1898, by Cross (assuming that Cross at the time had the legal right so to do) *instantly* created a trust, whereby the property covered by such bill of sale, was at once appropriated for the better security, and the payment, of such outstanding notes, as had then been executed by Cross, and endorsed by Martindale, or which might thereafter be executed by Cross, and endorsed by Martindale, while the title to the property conveyed remained in Martindale, pursuant to such bill of sale. This trust each of the appellants at the time this action was commenced, under the facts of the case, had the right to enforce in a court of equity, in their own names, without the aid or assistance of Martindale, regardless of the fact, that they were not parties to the transaction, and were ignorant of its existence, until after the death of Cross. The commencement of the action, and the claims asserted therein, by the two banks, and the statement of Harvey's claim contained in the stipulation, for the sale of the property, was an acceptance and affirmation of the trust by each one of the appellants.

Bank v. Guttschlich, 14 Peters 19;
Felix v. Patrick, 145 U. S. 317;
Clews et al. v. Jamieson et al., 182 U. S. 461.

If for any reason the bill of sale of July 15th was ineffectual to accomplish this equitable trust, or if the note held by the appellant Ford Harvey, after it came into existence on July 30th, was not protected by it, then the same result was accomplished, by the execution of the bill of sale of November 15, 1898, under the facts, concerning the purposes of its execution, disclosed by the evidence of Martindale.

The equitable principles, applicable to the facts of the case, and the maxims upon which the same are based, are very fully stated by Mr. Justice Matthews, in speaking for this court, in the case of Hampton v. Phipps (108 U. S. 260), as follows:

> "Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

This court fully recognized, and extended this equitable doctrine, in the subsequent well considered case of Keller v. Ashford (133 U. S. 610), where it was said by Justice Gray, in speaking for the court:

> "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment

of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor."

Chancellor Kent, in the leading case of Moses et. al. v. Murgatroyd (1st Johns Ch. 119), stated the rule as follows:

"I shall then consider this fact as well made out, viz., that the assignment of Feb. 12, 1806, though absolute on the face of it, was intended, by the parties to it, to be a security only to the intestate for his indorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the case of Maure v. Harrison, 1 Eq. Abr. 93, K. 5 Mich. 1692, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprised, at the time, of the creation of this security is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust and to enforce its performance. This was the principle assumed in the case of Neilson v. Blight, 1 Johns Cas. 205."

See to the same effect, the decision of Chancellor Walworth in Curtis et al. v. Tyler et al. (9 Paige's Ch. 432), see also the English cases therein cited:

Also: Clark v. Ely, 2 Sandf., Ch. 166;
Ten Eyck v. Holmes, 3 Sandf., Ch. 428;
Bank v. Comstock, 55 N. Y., 29.

The principles enunciated by this court, in the cases cited, have always been in full force and effect, within the jurisdiction in which these transactions occurred, as will be seen from the following quotations from the opinions of the Supreme Court of Kansas:

In the case of Seibert et al. v. Thompson (8 Kansas, 65) it is said:

> "The principal creditor is in equity entitled to the full benefit of any security given by the debtor to a surety for his indemnity and for the discharge of the debt; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. Maure v. Harrison, 1 Eq. Cas. Abr., 93, pt. 5; Wright v. Morley, 11 Vesey, 12, 22; Moses v. Murgatroyd, 1 Johns Ch. 119, 129; Phillips v. Thompson, 2 id., 418, 422; Pratt v. Adams, 7 Paige, 617, 627; Curtis v. Tyler, 9 id., 432, 435; Ten Eyck v. Holmes, 3 Sanf., 428; Roberts v. Calvin, 3 Grat., 359, 363; Toulmin v. Hamilton, 7 Ala., 362, 367; Ohio Life Ins. Co. v. Ledyard, 8 id., 866, 872; Paris v. Hulet, 26 Vt., 308; Riddle v. Bowman, 7 Foster, 236; Haven v. Foley, 19 Mo., 632; Aldrich v. Martin, 4 R. I., 520. * * * If property is pledged to either the creditor or a surety, though not to the person seeking to charge it, it may be reached by substitution in a court of equity, without regard to the intention of the contracting parties; per Parker J., in Hopewell v. Bank of Cumberland, 10 Leigh., 206, 226. See also McCollum v. Hinckley, 9 Vt., 143, 149."

It will be observed that the authorities which are cited with approval by the Court are authorities upon which we greatly rely for support of the propositions contended for.

In the subsequent case of National Bank v. Ridenour (46 Kansas, 707), the Supreme Court, after reviewing the authorities, speaking through Commissioner Strang, says:

> "It will be seen from the authorities cited that, even where the security is given to indemnify the surety solely, an equitable lien attaches to the securities in favor of the principal debtor, which he may enforce by a direct proceeding. His right does not depend on the law of subrogation."

The Supreme Court of Massachusetts, in the case of Aldrich v. Blake (134 Mass. 582), states the doctrine as follows:

> "A mortgage made by a principal to a surety, to secure the payment of a note, is not to be regarded in equity simply as an indemnity to the surety. It is not important whether it is in

form to pay the debt or to indemnify the surety. Where its object is to provide for the payment of debts, or to enable the surety to do so, he is constituted a trustee for the creditors whose debts are enumerated in the condition. An equitable lien is created in their favor, which is attached to the property in the hands of the mortgagee, which would follow it in the hands of his assignee with notice of the trust, and would also bind it in the hands of the original mortgagor or his assignee with notice of the trust. *Eastman v. Foster*, 8 Met., 19. *Rice v. Dewey*, 13 Gray, 47. *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175. *Prout* v. *Root*, 116 Mass., 410. *Rindge* v. *Sanford*, 117 Mass. 460."

One of the leading cases upon this question is that of Taylor v. Farmers' Bank, decided by the Supreme Court of Kentucky (87 Ky., 398), from which we quote as follows:

"The rule is well settled that where a security is given by a principal to his surety, it operates *co instanti* as a security to the creditor for the payment of his debt. The right of the latter cannot be defeated, even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a *bona fide* purchaser without notice; and, if contingent, the surety cannot defeat it after his liability becomes fixed. The reason of this rule is that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor, when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity with all the rights of the surety. In such a case the security is for the debt, as well as the ultimate protection of the surety. It at once is clothed with a trust character, and the creditor immediately acquires a right and interest in it that cannot be defeated by the act of the surety. He becomes a trustee for the creditor."

In Kramer & Rahm's Appeal (37 Pa. St., 71) the Supreme Court of Pennsylvania states the rule as follows:

"So in Cornwell's Appeal, 7 W. & S., 305, Justice Kennedy announces the same rule, saying 'it is a well-established prin-

ciple in equity that a creditor is entitled to all the securities taken by the surety of his debtor, either for the purpose of securing the payment of the debt to the creditor, or for the purpose of indemnifying himself.' To the same purpose are Erb's Appeal, 2 Penna. Rep., 296; Hines v. Barnitz, 8 Watts., 39; Carman v. Noble, 9 Barr, 366; Hancock's Appeal, 10 Casey, 155. The authorities place the principle upon the ground that as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him at the time of the purchase of the security, for which it may have been given as an indemnity. The effect of such a transaction is the placing of means in the hands of the surety by the principal debtor to meet liability on account of his contract of suretyship. It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety, so that it may be applied to the object intended, viz., the payment of the debt to the holder."

To the same effect: Rice's Appeal, 79 Pa. St., 168.

As said by the Court of Appeals of Missouri, in the case of National Bank v. Davis (87 Mo. App., 242):

"The property of the principal debtor belongs to the creditor, which, under certain circumstances, the latter may subject in the hands of the surety to the satisfaction of his debt. The holder of such indemnity is a trustee for the creditor. Hampton v. Phipps, 108 U. S., 260; Leggett v. McClelland, 39 O. St., 624; McDougall v. Walling, 21 Wash., 478. If the debtor give his surety indemnity, the creditor may avail himself of it by subrogation, even though in the first instance it was unknown to him. Leggett v. McClelland, ante; Hopewell v. Bank, 10 Leigh., 206; McCullom v. Hinckley, 9 Vt., 143. The rule is well settled that, where a security is given by a principal to his surety, it operates *co instanti* as a security to the creditor for the payment of his debt. The security so given is a trust fund and is regarded in equity as a trust fund for the payment of the debt. Taylor v. Bank, 87 Ky., 398. The security is for the debt as well as for the ultimate protection of the surety."

The rule is concisely stated in the case of Demott v. Stockton Paper Ware Mfg. Co. (32 N. J. Eq., 124), as follows:

"As a general rule, where a surety or a person standing in

the situation of a surety for the payment of a debt, receives security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance. And the right of the creditor is the same when the security is a mortgage, or other lien given to the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given; and to entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law or have reduced his debt to judgment. Brandt on Suretyship, par. 282."

In New London Bank v. Leo (11 Conn., 112), it is said:

"Property mortgaged to a surety to secure him for indorsing the mortgagor's note, whether such property be real or personal, may be subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent. In such case the creditor need not levy execution so as to obtain a lien upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien upon the property so mortgaged. The security or fund is created for the payment of the debt, and is a trust existing for that specific purpose, and whether the creditor or the surety be trustee is very immaterial. The trust is created ultimately for the benefit of the creditor."

A clear statement of the law upon this subject is contained in Brandt on Suretyship (2nd ed.) par. 324, as follows:

"As a general rule, where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him. The right of the creditor is the same when the security is a mortgage or other lien given the surety by the principal after the principal and surety have both become

bound, even though there may have been no previous agreement that indemnity should be given. To entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law, or have reduced his debt to judgment. A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and lien which subsist after the creditor's claim on the surety for the payment of the note is barred at law by the statute of limitations, and the fee of the mortgaged property has by foreclosure become vested in the surety. The trust which inures to the benefit of the creditor subsists till the debt is paid, and may be enforced against any one who takes the property with notice. After a trust of this kind has been created, it cannot usually be defeated without the consent of the parties in interest, unless it be by a conveyance to a *bona fide* purchaser without notice."

See to the same effect each of the following cases:

Parris v. Hulett, 26 Vt., 308;

Morrill v. Morrill, 53 Vt., 74;

Greene v. McDonald, 70 Vt., 372;

Roberts v. Calvin et al., 3 Gratt., 359, 363;

Homer v. Sav. Bank, 7 Conn., 484;

Plaut et al. v. Storey, 131 Ind., 46;

Demott v. Stockton Paper, etc., Co., 32 N. J. Eq., 124, 131;

Magill v. Brown et al. (C. C. App. Tex.), 50 S. W., 143;

Union Nat'l Bank v. Rasch, 106 Mich., 319;

Albion State Bank v. Knickerbocker, 125 Mich., 311;

Logan v. Mitchell, 67 Mo., 524;

South Omaha Nat'l Bank v. Wright et al., 45 Neb., 23;

Aultman, Miller & Co. v. Bishop et al., 53 Neb., 545;

Van Orden v. Durham, 35 Cal., 145;

Pierce v. Robinson, 13 Cal., 122;

Pomeroy's Eq. Jur., vol. 3, par. 1419; and authorities cited in note 1;

1 Storey Eq. Jur., par. 499.

II.

It is held by all authorities, that the creditor's lack of knowledge of the fact of the existence of the trust created is utterly immaterial, for the reason that when the creditor learns of it, he has the right to affirm it and enforce its execution. See authorities above cited, and also:

Bank v. Guttschlich, 14 Peters, 19, 31;

Felix v. Patrick, 145 U. S., 317, and cases cited upon this point;

McMullen et al. v. Neils Administrator, 60 Ala., 555, and authorities cited;

Kinsey v. McDearmon, 5 Cole, 326, 395;

Breedlove v. Stump, 3 Yerg., 257;

Osborn v. Noble, 46 Miss., 430, 455;

Price v. Truesdale, 28 N. J. Eq., 204.

The execution of the note by Cross to Harvey, of July 30th, and its endorsement by Martindale, for the accommodation of Cross, placed this note, the moment of its delivery to Harvey, within the security given to Martindale by the bill of sale of July 15th, as disclosed by the terms of such bill of sale.

Swift & Co. v. Kortrecht et al. (C. C. App., 6th Cir.), 112 Fed., 709.

III.

The court below, in holding that these bills of sale were given, as personal indemnity to Martindale, for his sole protection, and hence could only be enforced through his action, based its decision upon a doctrine that has been recognized, in but few jurisdictions in this country, and which is opposed to the great weight of authority, as will be seen by the following citations, and extracts from the leading cases:

In the case of Morrill v. Morrill (53 Vt. 74), the Supreme Court of Vermont had occasion to examine this question, and we quote from the opinion in that case as follows:

"This mortgage being valid as between Morrill and Bates, can this oratrix, being the beneficiary under the bond, executed by Morrill and Bates, make it available as a security to her for the amount due from her guardian? The mortgage was executed to Bates as an indemnity only. In some states a distinction seems to have been drawn between cases, where the security is given for indemnity only, and where it is given both for indemnity to the surety, and to secure the debt. Where it is given as security for the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose or not at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually, on maturity of his debt, as he could, had it been assigned to him directly.

"But when the assignment is for indemnity only, some courts have held that the surety's rights to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor, and that the creditor can only reach the security by way of subrogation after the surety has been damnified, actually or constructively. Rankin v. Wilsey, 17 Iowa, 463; Carpenter v. Bowen, 42 Miss., 28; Hopewell v. Bank, 10 Leigh, 206.

"The great weight of authority, however, is against the propositions, that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt, for which he is holden. The surety has the right to apply the security directly to the payment of the debt. If the surety pays with his own funds, he keeps his principal's debt on foot against him, and then applies the security to its payment. Thus in any event the funds of the principal are made to satisfy the principal's debt, and this accords with the purpose of the principal, when he gave the security. If the surety, after the assignment of the security, becomes insolvent, or by any act of the creditor, is discharged from liability, he holds the security in trust for the creditor. Cullum v. Br. Bank, 23 Ala., 797; Clark v. Ely, 2 Sand., Ch. 166.

"The clear deduction from the cases is, that an assignment of securities by the principal to his surety for indemnity merely,

raises an implied trust in favor of the creditor, which, on maturity of his debt, he may enforce, whether the surety has been damnified or not, and irrespective of the question whether the surety or principal, either or both, are insolvent. New Bedford Inst. for Savings v. Bank, 9 Allen, 175; Kramer's Appeal, 37 Penn. St., 71; Rice's Appeal, 79 Penn. St., 168; Seibert v. True, 8 Kan., 52; Ohio Life Ins. Co. v. Ledyard, 8 Ala., 866; Moore v. Moberly, 7 B. Mon., 299; Curtis v. Tyler & Allen, 9 Paige, Ch. 432; Ten Eyck v. Holmes, 3 Sand., Ch. 428; Parris v. Hulett, 26 Vt., 308; 1 Story Eq. Juris., s. 499 (Redfield's ed.); Brandt Suretyship, s. 283."

In the leading case of New Bedford Inst. for Savings v. The President et al. (9 Allen, 175), the Supreme Court of Massachusetts, in discussing this question, say:

"The order of the judge of insolvency which the plaintiffs by their bill seek to have annulled was made on the ground that the mortgages are not to be regarded simply as having been made for the benefit of Sylvanus Allen as indorser, but that they constituted him a trustee for such persons as might become holders of the notes, and that this equitable lien, being attached to the mortgaged property in the hands of Sylvanus, remained and bound the property in the hands of the assignee. The cases of Eastman v. Foster, 8 Met., 19, and Rice v. Dewey, 13 Gray, 47, are relied on as authority for this position. The plaintiffs do not deny the doctrine of those cases, and as it was there settled so recently, and discussed so fully, it cannot be considered as open to discussion here. But the plaintiffs contend that the present case is to be distinguished from them; because in both of those cases the condition of the mortgage was not only that the principal should indemnify the surety, but also that he should pay the debt; whereas, in the present case, it merely stipulates that he shall indemnify the surety, and makes no mention of the payment of the debt. But it is well settled by the authorities that the creditor has an equitable claim to the security, as well when the mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt. In Moses v. Murgatroyd, 1 Johns., Ch. 119; Phillips v. Thompson, 2 Johns., Ch. 418; Ten Eyck v. Holmes, 3 Sandf. Ch. 428; Riddle v. Bowman, 7 Fost. (N. H.), 236; and Aldrich v. Martin, 4 R. I., 520, the security was given merely to indemnify the indorser, and yet the creditor was held to be entitled to it. The

law is so stated in 1 Eq. Cas. Ab. 93, which is cited in several of the American cases. The equitable right of the creditor does not rest upon contract, but he is put upon the same equitable footing with a co-surety. The law has been long settled."

See also Aldrich v. Blake, *supra*, decided by the same court.

This same question was discussed, and disposed of adversely to the theory of the Circuit Court of Appeals, in the following cases:

Plaut v. Storey, 131 Ind., 46, *supra;*

Union Nat'l. Bank v. Rasch, 106 Mich., 319;

Albion State Bank v. Knickerbocker, 125 Mich., 311, *supra;*

Taylor v. Farmers Bank, *supra;*

National Bank v. Ridenour, *supra;*

National Bank v. Davis, *supra.*

In the case of Swift & Co. v. Kortrecht et al., *supra*, the Circuit Court of Appeals for the 6th Circuit, in passing upon this question, say:

"The rule has long been settled that all securities given by the debtor for the payment of his debt inure to the benefit of the creditor. It is not necessary that they be given directly to the creditor or in express terms contain an agreement to pay the debt. If given to a surety to secure him, equity treats it as collateral to the debt. Some of the decided cases suggest a distinction which would exclude from the operation of the rule those cases where the language of the securing instrument indicates only a purpose to indemnify the surety, and does not indicate any agreement to pay the principal debt. But it does not appear to us that there is any solid ground for this distinction. It rests upon the idea that the creditor's right can be no larger than that of the surety, which is measured by the terms of his security. But, when the debtor procures his surety to become liable for the debt, an implied obligation immediately falls upon the debtor to pay the debt himself. * * The obligation is equally effective as if it were literally expressed. How else shall the debtor save his surety harmless than by satisfying the obligation? There is therefore no enlargement of the debtor's obligation by the subrogation of the creditor.

The Supreme Court of Tennessee, in which state these transactions occurred, has held from an early date that a security such as was this trust deed to Sears of February 20, 1896, inures by the doctrine of subrogation to the benefit of the creditor. The leading case in that state is Breedlove v. Stump, 3 Yerg. 257. Other cases are Robertson v. Sublett, 6 Humph., 313; Kirkman v. Bank, 2 Cold. 407; Kinsey v. Mc Dearmon, 5 Cold. 395; Saylors v. Saylors, 3 Heisk. 530. And decisions of the Supreme Court of the United States are in accord with that of the state upon the general principle. Hampton v. Phipps, 108 U. S., 260, 2 Sup. Ct., 622, 27 L. Ed., 719; Keller v. Ashford, 133 U. S., 622, 10 Sup. Ct., 494, 33 L. Ed., 667. In Hampton v. Phipps the subject was fully discussed by Mr. Justice Matthews in delivering the opinion of the court, and the maxims of equity supporting the doctrine collated."

In Cullom v. Branch Bank, (23 Ala., 797), the court held:

"In some states a distinction seems to be drawn between cases where security is given for indemnity only, and where it is given both for indemnity to the surety, and to secure the debt. Where it is given to secure the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose or not, at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually on maturity of his debt as he could had it been assigned to him directly. But when the assignment is for indemnity only, some courts have held that the surety's right to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor, and that the creditor can only reach the security by way of subrogation, after the surety has been damnified, actually or constructively. The great weight of authority, however, is against the proposition that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt for which he is holden."

See also:

Tompkins v. Catawba Mills, etc., (C. C., D. S. C.), 82 Fed., 780;

Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co., (C. C. App. 6th Cir.), 101 Fed., 699, 703.

We also call attention to those cases hereafter cited under Subdivision II of the third point herein.

Regardless of the proposition stated, it is perfectly clear, from a reading of the bill of sale of July 15th, that it was the intention of Cross to place this property in the hands of Martindale for the payment of the debts, for which Martindale was endorser, and to postpone the claims of the Bank to anything that might be left, after paying such claims. It would be a very forced and strained construction, in a court of equity, to say, that this instrument evidenced an intent, that it was intended as so personal to Martindale, that it could not be considered as pledging the property for the payment of the debts.

It is the law in the State of Kansas, that the beneficiary under such a trust as is claimed in the case at bar, can institute direct proceedings in his own name, and is not compelled to act through the trustee.

National Bank v. Ridenour, 46 Kansas, 707, 715, *supra;*

And this is the doctrine of this court:

Russell v. Clark, 7 Cranch, 89, 97.

IV.

Under the equitable principles contended for, and fully established by the decisions of this court, and the other authorities cited, appellants were entitled to the fund, under the bills of sale of July 15th, and November 15th, 1898. The July bill of sale is definite as to the property embraced by it, and reasonably certain as to the debts secured. It reads:

> "The property which I transfer to the said Martindale is partially described as follows: all my live stock, cattle, hogs and horses now on Sunny Slope farm, Lyon county, Kansas, together with all other personal property thereon or on farm adjoining. * * * The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in

the Lyon County court, after which he is to pay himself for any paper upon which he and I are mutually makers or indorsers. The balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them."

There is no dispute as to the indebtedness owing appellants from Cross, upon which Martindale was an endorser, to-wit: $20,000.00 to the Fourth National Bank of St. Louis, $30,000.00 to the First National Bank of New York, and $10,000.00 to Ford Harvey. The execution and delivery of the notes and bills of sale is testified to by Martindale (pr. tr. pp. 136 to 138), and the fact is not disputed by any evidence in the case. Copies of the instruments were attached to the original and amended complaints and cross-complaint, and the originals produced upon the hearing. Therefore the appellants had an equitable lien on the Sunny Slope property, by virtue of these bills of sale, and could maintain this suit to realize thereon. Their combined claims exceed the amount of the fund; consequently the whole of it should be decreed to them, unless the court should find, as did the Circuit Court of Appeals, that there was competent and sufficient evidence to establish the fact, that the bill of sale of March 4th, 1898, was executed for the purposes set out in the receiver's answer.

THIRD POINT.

The Circuit Court of Appeals erred in holding that there was competent evidence to sustain the finding by the trial court, that the bill of sale of March 4, 1898, was made to secure the indebtedness of Cross to the Bank, and that by reason of such bill of sale the fund in controversy stood pledged for that purpose. (See specification of error 3, and assignment of error 3, pr. tr. p. 212.)

I.

Albaugh, as receiver for the Bank, was permitted by a written stipulation of all of the parties, to file his answer the day before the hearing, upon the agreement that every allegation in such answer should be considered denied by each party, without the filing of a formal replication. (Pr. tr., p. 131.) This answer plead, in substance, the execution of the bill of sale of March 4, 1898, and alleged that it was executed for the purpose of securing the Bank, in a loan to be made to Cross, and also to secure it, for indebtedness then owing from Cross to the Bank. The court will bear in mind that, on the face of this bill of sale of March 4th, there is nothing to indicate, or suggest, the particular property embraced in it, the consideration for it, or the purpose of its execution. It merely recites:

> "I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators and assigns, the following goods and chattels, viz.: all of my personal property of every kind and description and wherever located, with exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon County, Kansas; to have and to hold all and singular the said goods and chattels forever."

It was therefore absolutely necessary for the receiver not only to prove the execution, but also to establish the purposes, for which this bill of sale of March 4th was executed, to be those alleged in his answer. At the hearing Martindale was called as a witness by the complainant, to prove the execution, and delivery to him, by Cross, of each of the bills of sale of July 15th and November 15th, and the purposes for which they were executed. This the complainant had a perfect right to do.

Butts v. Privett, 36 Kansas, 711;
Morgan's Assignees v. Shinn, 15 Wall., 105.

Upon the cross-examination of Mr. Martindale, the receiver, without making Mr. Martindale his own witness, and over the objections on the part of appellants, that it was not proper cross-examination, was permitted to interrogate Martindale as to the execution of this bill of sale of March 4th, and the purposes for which it was executed. The following shows all of the cross-examination, with reference to this bill of sale of March 4th (the objections and exceptions being omitted):

"Q. Did you receive a bill of sale prior to the July bill of sale? A. Yes, sir.

Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.

Q. Look it over and tell the court if that is what you received. A. That would be my best judgment.

Q. When did you receive that? A. Early in March.

Q. Perhaps the date of it? A. I would think so.

Q. What did he say? A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover that amount.

Q. Mr. Martindale, I will ask you this, if you did not state in my office in the presence of Judge Buck, Judge Kellogg, and both of the Maddens and myself and Mr. Albaugh, that Mr. Cross said he was using large sums of money of the bank and that he wanted to use more, and that he wanted to make the bank secure? A. No, sir, I did not say that.

Q. And in that conversation when you — asked to give the entire conversation that occurred between you and Mr. Cross

on this bill of sale, didn't you state there that Mr. Cross said to you, 'I have been using large sums of money for Sunny Slope, and I have to use more money for Sunny Slope, and I want to secure the bank?' A. He didn't say that.

Q. Didn't you state that? A. I don't think I did.

Q. Were you asked there to give all the facts concerning the delivery of that bill of sale to you? A. I think so.

Q. Now in that conversation did you mention that sum you mentioned a few moments ago, of $7500.00? Did you mention that in that room? A. If I did not my attention was not called to it.

Q. No, but you were asked to give all the particulars. A. My best recollection would be that I referred to the Leibfried matter.

Q. Weren't you brought there and requested to state the circumstances surrounding the delivery of this bill of sale? A. All the bills of sale?

Q. And you attempted to do that? A. Yes.

Q. And you say now that you did not say then that it was given because Mr. Cross had been using large sums of money for Sunny Slope, and that he would have to use more? A. I don't believe Mr. Cross ever told me that.

Q. But did you say that? A. I don't believe I did."

(Pr. tr. pp. 144, 145.)

This testimony of Mr. Martindale, not only failed to establish that the purpose for which Cross had executed the bill of sale of March 4th, was that alleged in the answer of the receiver, but completely disproved that it was issued for any such purpose, and disproved the right of the receiver to make any claim through it to this fund. To avoid the result so brought upon himself, the receiver was then permitted (over the strenuous objections of appellants) to give in evidence a verbal statement, made by Martindale to the receiver, and his attorney, in their presence, and in the presence of some other people, but not in the presence of appellants, or their attorneys, or within their knowledge, or consent. This statement, as shown by the testimony given to establish it, was made in the preceding January, *some ten months after this action was commenced*, and nearly two years after the execution of the bill of

sale, and long after whatever rights the appellants had in the bills of sale of July 15th, and November 15th, had fully attached. For convenience, we copy the testimony given by the receiver and his attorney concerning this statement, omitting the objections and exceptions taken thereto, to-wit:

"Q. Mr. Albaugh, you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him in March 4th, and if so, state fully what that conversation was. A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation? A. I am quite sure he did not.

CROSS-EXAMINATION:

Q. Did you state when that was? A. I could not give the exact date this conversation took place.

Q. It was since this suit was commenced? A. Yes.

Q. What was the date of that conversation? A. I couldn't give the exact date.

Q. Can't you state the month? A. I think it was some time in January.

Q. Of this year? A. This year.

Q. How long did this conversation continue? A. Oh, we were probably present there some ten or fifteen minutes.

Q. Who all were present? A. There was Mr. Lambert, Mr. Huggins, Mr. Madden, Mr. Martindale, Mr. Kellogg. I am not sure whether Mr. Spencer was there.

* * * * * * * * * * *

REDIRECT EXAMINATION:

Q. This was the first information you had of that bill of sale? A. It was; that is the reason my attention was attracted to it.

Q. And upon that bill of sale you set up your answer that you were entitled to the property on that bill of sale? A. Yes." (Pr. tr. pp. 156, 157, 158.)

Mr. Lambert testified as follows:

"Q. Now, was this the first time that you had any definite information in relation to this bill of sale apparently dated March 4th, 1898? A. I had heard rumors of other bills of sale dated before this and that they were supposed to be in the interests of the bank, but had no information at all as to whether such a bill of sale existed or not.

Q. I will ask you, we had gotten out a subpoena, that is to say the administrator had, to take Mr. Martindale's testimony, and his attorneys said he didn't want to go on the stand, but said he would tell you folks anything he knew— A. Yes, Mr. Kellogg said for me not to urge him to go on the stand, that he would be in court, and I said we wanted to know what there was in these bills of sale. He said Mr. Mar tindale did not want to go on the stand and subject himself to cross-examination until his criminal case was out of the way.

Q. Did he for the first time, so far as you had any information, exhibit that March 4th bill of sale? A. Yes.

Q. And then right soon after that you prepared the pleadings that you filed for the receiver? A. Yes, sir.

Q. Now, what did he say, if he said anything, about what that was given for? A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank, or to secure the bank.'" (Pr. tr. pp. 159, 160.)

While Mr. Madden testified to the same facts (pr. tr., pp. 155, 156), his testimony was, by the court, stricken out, and not considered. (Pr. tr. p. 156.)

In addition to the foregoing testimony, the receiver was permitted by the court (over the objections and exceptions of the appellants), to introduce the testimony of J. M. Johnson, John Henning, George Plumb, and Charles Johnson, (pr. tr. pp. 94, 98, 106, 107 and 109), to the effect, that after the death of Cross, and the closing of the Bank, Martindale had stated to these parties, or in their presence,

that the proceeds of the sale of the stock on the Sunny Slope farm should, or would go to the Bank.

The evidence above quoted, and referred to constitutes *all* of the evidence heard by the court, showing, or tending to show, the execution of the bill of sale of March 4th, by Cross to Martindale, and the purposes for which the same was executed, and constitutes the *only* evidence in the case, upon which the decree of the Circuit Court was (or could be) sustained by the Circuit Court of Appeals, or can now be sustained by this court.

The theory of the Circuit Court of Appeals, in sustaining this action of the Circuit Court, is shown by the following extract from its opinion:

> "If Martindale was entitled, as against the receiver, to appropriate the fund in controversy to the payment of his own obligations which were held by Harvey and the two banks, then, and not otherwise, they were entitled to insist that he should exercise this right for their benefit and advantage as well as for his own. In view of these facts, we are of opinion that it was competent for the receiver to inquire of Martindale on his cross-examination concerning the bill of sale of March 4, 1898; that by so doing the receiver did not make Martindale his own witness in any such sense as to be concluded by his statements; and that it was competent for the receiver to show afterwards, as against all of the parties who claimed adversely to him, the admissions which Martindale (a party to the suit, and the one in whom the adverse right to the fund was vested primarily) had made in the presence of several persons, to the effect that the conveyance of March 4, 1898, was made to him, as trustee for the First National Bank of Emporia, to secure whatever indebtedness Cross then owed to the bank, or might afterwards owe to it. * * * We conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia and that from and after the execution of that instrument all of his personal property of every kind and description, except his personal effects, insurance policies and the contents in his house in Emporia, Kansas, stood pledged for that purpose."

(Pr. tr. p. 210.)

Passing, for the time being, our claim of errors committed by the Circuit Court of Appeals, in sustaining the Circuit Court in its rulings in respect to these matters, and assuming, for the purposes of the point we are now making (that which we shall elsewhere deny), that as Martindale was a party to the action in the court below, and had filed an answer therein, in which he asked affirmative relief (pr. tr. pp. 18 and 19), the court below had the right, as against him, and his claims, to hear testimony as to statements made by him, subsequent to the filing of this answer, tending to establish the fact, that the claims in his answer were untrue, we emphatically assert, that these verbal declarations of Martindale, made in January 1900, more than eighteen months after the execution of the bill of sale of July 15th, and eight or nine months after the complainant in this action filed its bill, to appropriate the property conveyed under the equities created therein in favor of appellants, not under oath, or in the presence of, or authorized by appellants, or either of them, could not be proof against the appellants of any *fact* contained in such statements, and that the theory of the Circuit Court, as shown by the above excerpt from its opinion, is not sustainable, upon principle or authority.

II.

Under the doctrine of the decisions of this court, and the decisions of other courts of last resort, which we have heretofore cited, the equitable rights of the appellants attached to the property, conveyed by Cross to Martindale through the bills of sale of July 15th, and November 15th, *eo instanti* upon the delivery of such bills of sale, and Martindale instantly became a trustee of the title to the property conveyed, for the benefit of each of the appellants, to the *then* extent of his own rights to have that property appropriated to the payment of the debts of Cross, for which he was surety.

The decisions heretofore referred to, necessarily establish the proposition, that the creditors of the principal debtor, *at some*

precise point of time, absolutely acquire the equitable rights in collateral security given to a surety, applicable to their benefit, and if it be possible to say, that those in the case at bar were not acquired instantly the bills of sale were delivered, it must then be held, that appellants acquired the same the moment they severally acquired knowledge of the existence of such bills of sale, and the purposes for which they were made, assented to, and acted, or attempted to act, upon the rights that equity created for them in the property conveyed. The complainant, by filing its bill to appropriate the fund, on February 28, 1899, accepted the trust created, and fully appropriated and sought to enforce it. The appellant, the First National Bank of New York, accepted the trust, appropriated and sought to enforce it, when it filed its cross-bill of April 22, 1899, and Ford Harvey, when he consented to, and signed, the stipulation, authorizing the sale of the property by the receiver, in which it was recited, that he claimed the property, under these bills of sale, accepted and appropriated the trust thereby created; hence it follows: that if the mere execution, and delivery of these bills of sale did not instantly vest the equities in these parties, they certainly were appropriated by, and vested in them, at the dates stated, by the actions taken. The bringing of this action of itself affirmed the trust.

Felix v. Patrick, 145 U. S., 317;
Clews v. Jamieson, 182 U. S., 461.

It would be violative of all equitable principles to say, that after the equities of appellants had become vested, Martindale, without the knowledge, or consent, of appellants, could, by any action on his part, discharge the property from the trust created. Outside of the few courts that hold, that a trustee may do as he pleases with collateral security that is for his own personal benefit or indemnity, the courts are in agreement upon the proposition that the surety cannot, after the equities of the principal creditor attached, by any

act, discharge, or defeat, such equities, or the trust created thereby.

In Colebrooke on Collateral Securities, (2nd ed., sec. 217), it is said:

> "Where the surety himself has received such securities from the principal debtor on account of obligation assumed, equity creates a quasi trust in relation thereto in favor of the creditor and co-sureties until the debt be discharged. The surety has no right to discharge or defeat such trust."

The Supreme Court of North Carolina in the case of Ijames v. Gaither (93 N. C., 363), states the proposition as follows:

> "We think it clearly to be gathered from the authorities that as soon as such a deed of indemnity is given, the equitable right of the creditor attaches to it, and it is not in the power of the surety to put it beyond the reach of the creditor."

To the same effect are each of the following authorities:

Blanton v. Bostic, 126 N. C., 418;
Curtis v. Tyler, 9 Paige, 432;
Clark v. Ely, 2 Sandf. Ch. 166, and authorities cited;
Ten Eyck v. Holmes, 3 Sandf. Ch. 428;
Streeter v. Seigman (N. J. E.), 48 Atl., 907;
McMullen et al. v. Neils Administrator, 60 Ala., 552;
Ohio Life Ins. Co. v. Ledyard, 8 Ala., 866;
Cullum v. Bank, 23 Ala., 797;
McRady v. Thomas, 16 Lea (Tenn.), 173;
Durham v. Craig, 79 Ind., 117;
Taylor v. Farmers Bank, *supra;*
Bank v. Davis, *supra;*
Brandt on Suretyship, *supra;*
Eastman et al. v. Foster, 8 Met. (Mass.), 19;
Aldrich v. Blake, *supra;*
Magill v. Brown et al., *supra;*
Boyd v. Parker & Co., 43 Md., 182;
McCracken v. German Fire Ins. Co., 43 Md., 471;
Ross v. Wilson, 7 S. M. & M., 753;
Osborne v. Noble, 46 Miss., 449.

While we may concede, that the equities in favor of appellants, which attached to the property conveyed by Cross to Martindale, are each controlled, and limited by the extent of the right of Martindale, at *that* time or at the time when such equities attached, to have the property applied for his own protection, yet it must be held, that the right of Martindale, which in any wise limits, or controls such equities, is the right, as it existed at the very time, or times, when the equities in favor of appellants attached to the property, and not the right as it may have existed at some subsequent period of time, after such equities had attached.

It is possible that it is the fact, that the bill of sale of March 4, 1898, was executed by Cross to Martindale to secure the Bank, and if the fact, it would follow: that the bills of sale of July 15th, and November 15th, were only operative to secure Martindale and the appellants, to the extent that anything might be left of the proceeds of the property, after satisfying the claims of the Bank; but if a fact, there is no apparent reason why it should have been permitted to be established by hearsay evidence. It is further possible that the declarations of Martindale to the receiver, in January, 1900—eight or eighteen months after the equities of appellants had attached, and long after this action was commenced—might be evidence, as against Martindale, seeking on his own behalf, (and not as trustee for appellants), to enforce the bills of sale of July 15th, and November 15th, that Martindale had no enforceable rights against the receiver, but this would be purely upon the ground, that the declarations of a party, adverse to his own interest, are always admissible in evidence against such party, and may, as against him, establish facts otherwise not proven. If, however, Martindale, subsequent to the attaching of the equities of appellants to the property conveyed, was powerless to in any way destroy such equities, by releasing the property, or by conveying it to one having knowledge of the same, then it would seem clear that he would be equally powerless to destroy those equities by creating

the existence of facts which would operate to destroy them, through the process of making mere verbal statements to third parties concerning past events, with which appellants had no connection after the time when the rights of appellants had attached. If after the rights of appellants attached, Martindale had executed a release to either the estate of Cross or to the receiver of the Bank, of all his claims upon the property, in order to make good his statements to Johnson and others, such release would perhaps have estopped him from thereafterwards attempting to enforce any claims on his own behalf, under the bills of sale of July 15th, and November 15th, as against the receiver, or the estate, yet, under the authorities, such action, could have had no effect to prevent the appellants from asserting their equities against the property. Under the theory of the court below, Martindale's statements, not acted upon in any way by the receiver, created, as against appellants, who were not parties to such statements, and had not authorized them, facts which instantly operated to divest the appellants of their equities, regardless of the fact, that Martindale, under oath, denied the truth of such statements, and fully proved the right of appellants to enforce their equities.

III.

It is pretty difficult to conceive how Martindale's statement, not under oath, could be held to prove a fact, which, under oath, he swore did not exist. The receiver, not acting upon such statement, to his injury, no equitable estoppel intervened, to prevent Martindale from stating the truth when he was called as a witness. Up to the time the statement was made, the receiver had no real, or tangible claim against the property, or its proceeds. Although he had entered his appearance in the action, and waived the issuance of process in February, 1899, he waited for a year before filing any pleading in the case, and then only filed a claim, based upon the statement of Martindale, witnout any knowledge of his own, as to the truth, or

falsity, of such claim. The receiver first proceeded upon the theory, that Cross, through the wrongful use of the money of the Bank, had acquired the property from which the fund in controversy was derived, and that, therefore, the Bank had the equitable right to trace these misappropriated funds into this property, and appropriate the same for the payment of the Bank. (See the recital in the agreement for the sale of the property, pr tr. p. 15; testimony of Evans, p. 77; and testimony of Jobes, receiver, pp. 103 to 105.) After having the books of the Bank experted by an expert bookkeeper (pr. tr. pp. 84 to 95), the receiver was unable to establish any claim to the stock, on account of the fraudulent use of the funds of the Bank, in the acquirement of it, and was then left at sea, as to any claim he could make in this action, until Martindale made the statement testified to. The circumstances surrounding the transaction show, that Martindale's testimony on the stand was the truth, and that his statement out of court was an untruth. The allegations in the answer of the receiver are to the effect, that Cross desired additional money from the Bank, to use about his farm, and that the bill of sale was given to secure that, and his prior indebtedness, but no evidence was offered to show, that any additional money was taken by Cross, upon, or immediately after the execution of this bill of sale of March 4th. The execution, and delivery, of the bill of sale of July 15th, with the statement contained in it, is, of itself, a sufficient refutation of the facts claimed to have been proved by Martindale's statement.

It would seem, therefore, in any view of the case, that the court had no right to accept this unsworn statement as the truth, and disregard the sworn statement, that, if it had the right to do so as to Martindale, it was clearly error to accept such proof as conclusive against the appellants, and their rights.

IV.

In finding that there existed such an identity of interest between Martindale and each of the appellants, as gave Martindale the right to bind appellants, by a narration of past events, concerning another and independent transaction, not connected with the interests in which it is claimed this identity exists, the Court of Appeals must have determined, that there was a partnership, between Martindale, and each of the appellants, in the rights created by the bills of sale of July 15th, and November 15th, as upon no other theory would it be possible to sustain the views of the Circuit Court of Appeals.

Greenleaf on Evidence (15th ed.), par. 112, and authorities cited.

Such a theory, upon the facts of the case, would be absolutely incorrect.

The "New Orleans," 106 U. S., 13.

Even upon the theory of a partnership, it would be difficult to understand how the statement of Martindale, concerning a past transaction, in which the partnership was not interested, could bind the partnership, where no principle of estoppel was involved.

V.

On its face there is nothing to indicate or suggest the particular property embraced by the March bill of sale, the consideration for it, nor what it was intended to secure. It merely recites:

> "I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz.: all of my personal property of every kind and description and wherever located with the exception of my personal effects, insurance policies and the contents of my house at Emporia, Lyon County, Kansas; to have and to hold, all and singular, the said goods and chattels forever."

Such a description is too indefinite and uncertain to give any validity to the instrument as a mortgage. It neither describes any particular property nor gives information by which any property could be identified by it; nor does it suggest what its purpose was.

Tootle, Hanna & Co. v. Eyster, 26 Kan., 589;
Milwaukee, etc., R. Co. v. Milwaukee & West R. Co., 20 Wis., 174;
Rochelean v. Boyle, 11 Mont., 451.

No claim of any kind was made under this until long after this suit was commenced, and neither Cross nor Martindale regarded it as in force when the later bills of sale were given. Even if delivered in March, 1898, for all that is claimed for it, the parties to it could displace it with another instrument (prior to its being accepted, and acted upon by the Bank), as they clearly did by the bill of sale of July 15th, which expressly provided that such claims as appellants' should be first paid out of the Sunny Slope property, "the balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them."

The only evidence under oath, explanatory of this bill of sale, is the testimony of Martindale on cross-examination, *supra*.

FOURTH POINT.

The 5th specification of error should be sustained. (See fifth assignment of error, setting out cross-examination, pr. tr. p. 212.)

I.

With the full knowledge, at and prior to the time of the hearing, that Martindale was the only witness, by whom he could expect to prove the execution of the bill of sale of March 4th, and the purposes for which it was executed, the receiver, for the purpose of making such proof, and yet escaping the result of making Martindale his own witness, was permitted by the trial court to make such proof upon the cross-examination of Martindale, over the earnest objections thereto by appellants. (Pr. tr. p. 144.) Not a word upon the subject of this March 4th bill of sale had been mentioned in the direct examination, which had been directed entirely, to the proof of the execution of the bills of sale of July 15th, and November 15th, and the purposes for which they were executed. That the action of the trial court, in permitting the receiver to give evidence in chief, by way of cross-examination of this witness, was error, seems clear.

At a very early date this court, speaking through Justice Story, in Philadelphia & Trenton R.R. Co. v. Stimpson (14 Peters, 448, 461), said:

> "A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct-examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

This rule has been consistently followed by this court since that time.

Houghton v. Jones, 1 Wall., 702;
Wills v. Russell, 100 U. S. 621.

See also:

Clary v. Hardeeville Brick Co., 100 Fed., 915.

In enforcing the rule contended for, the Circuit Court of Appeals, which rendered this decision said, in the case of Mine & Smelter Supply Co. v. Parke & Lacy Co. (107 Fed., 884) (the italics are ours):

> "To this cross-examination the plaintiff objected upon the ground that it was not proper cross-examination, and was irrelevant and immaterial, and the court very properly sustained the objection. 1 Greenl. Ev., sec. 445. 'To permit the defendant, under guise of cross-examination, to give evidence in chief, *is not only disorderly*, but *unfair to the plaintiff*.' Hopkinson v. Leeds, 78 Pa., 396, approved and followed in Fulton v. Bank, 92 Pa., 112, 115."

In Da Lee v. Blackburn, 11 Kan., 190, the court held:

> "A defendant while cross-examining a witness of the plaintiff, has no right, except by consent of the parties and permission of the court, to make said witness his own, and then introduce original evidence from this witness for the purpose of proving his own side of the case."

The Supreme Court of Pennsylvania, in Sullivan v. R. Co., 175 Pa. St., 361, said:

> "It (the cross-examination) should be confined to the subject of the examination in chief, and to the credit of the witness, and not used as a means to introduce a defence to the action. When, under the guise of cross-examination, the defendant has improperly brought the attention of the jury to facts upon which he relies to defend the action, they should be considered as evidence in chief for him, and they cannot be made the basis of a compulsory non-suit."

> "A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter, the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and

should be subjected to the appropriate restraints. There is no reason, in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense."

People v. Court, 83 N. Y., 436, 459.

See also:

Greenleaf on Evidence (15th ed.), par. 447.

Conceding that an abuse of discretion must be shown, to warrant the reversal of a case, for the infraction of the rule by a trial court, such abuse of discretion is clearly established in the case at bar, under the facts in connection with the situation and knowledge of the parties. As was said by the Court of Appeals of Colorado, in the case of Tourtelotte v. Brown (1 Colo. App., 408):

"2. The order of introducing testimony and latitude allowed in cross-examination are greatly in the discretion of the court. In this case we think the discretion was abused and prejudicial, not so much in allowing the defense to attempt to establish their contention at that time, but in effect to allow the witness Hurd, in all matters aside from those on which he was examined in chief, to become the witness of the defense without its being obligatory, and for which they were not requried to assume any responsibility, and where the plaintiff was deprived of the right of cross-examination. The rule is well settled that when a witness is allowed to be examined on cross-examination on matters extraneous, not embraced in the direct examination, he is to be regarded as the witness of the party examining, and he is so far concluded by it as to prevent its contradiction. This rule is so well known and established that authorities are hardly necessary."

See also the citations and authorities given under the fifth point.

FIFTH POINT.

The 6th and 7th specifications of error should be sustained. (See 6th and 7th assignments of error covered by these specifications, pr. tr. pp. 213, 214.)

I.

It will be remembered that upon the cross-examination of Mr. Martindale, with reference to this bill of sale of March 4th, he testified that Mr. Cross, at the time he delivered it to him, said that he wanted to use $7500.00 in the Leibfried matter, and wanted to make a mortgage or bill of sale covering that amount; and that he then was immediately asked if he had not, previously, in the office of Mr. Lambert, in the presence of certain parties, stated:

> "that Cross said he was using large sums of money of the bank, and that he wanted to use more, and that he wanted to make the bank secure;"

Martindale denied this, and the question was in repeated in several different forms to him. (Pr. tr., pp. 144,145.)

The receiver placed upon the stand Mr. John Madden, who testified (over the objections of appellants) that Martindale, at the time referred to in his cross-examination, said that Cross stated to him, concerning the bill of sale of March 4th, that he borrowed money from the Bank, and was largely indebted to the Bank, and would have to use more money for Sunny Slope, and that he made out this bill of sale of March 4th and handed it to Martindale. Upon motion by appellants, based upon the same reasons as were stated in the objections of appellants, to the giving of it, this testimony was stricken out (pr. tr. pp. 155, 156); but immediately the receiver himself was called, and examined as to the same matter, and testified to the same statement, over the same objections by appellants, that the matter was hearsay, and an attempt to impeach the witness, who had as

to this matter become the witness of the receiver; and Lambert was also permitted to testify, on behalf of the receiver, over the same objections to the same statement; and the court overruled the same motion to strike the testimony out, as was made, and sustained as to Madden's testimony. (Pr. tr. pp. 156 to 160.)

The testimony of the receiver, and Lambert, was introduced either for the purpose of contradicting, and impeaching Martindale, or for the purpose of establishing, by Martindale's statement out of court, that the bill of sale of March 4th was executed to secure the Bank, or for both purposes. To permit this, for either or both purposes, was, as it seems to us, material error, prejudicial to appellants. To say the least, Martindale, in his testimony concerning this bill of sale of March 4th, should be held to have been the witness of the receiver, and not subject to impeachment, by proof of contradictory statements.

1 Greenleaf on Evidence (15th ed.), par. 442, and cases cited;

1 Wharton on Evidence (3rd ed.), sec. 549;

Best on Evidence (14th Am. ed.), sec. 645;

Becker v. Koch, 104 N. Y., 394, 400, and authorities cited.

Fairchild v. Bascom, 35 Vt., 398, 417.

In 10 Encyc. of Pl. and Pr., 316, 317, it is said:

> "Where a party voluntarily calls a witness in support of his case, he thereby so far vouches for the credibility of such witness that he will not, as a general rule, be permitted to impeach him by proof, either of his general reputation or of his contradictory statements made out of court at another time."

In Ellicott v. Pearl (10 Peters, 412, 441), Mr. Justice Story said:

> "But in truth the evidence was offered to discredit, in part, his present testimony; and certainly the defendants were not at liberty to discredit their own witness by showing his former declarations on the same subject; though they might show by other witnesses that he was mistaken."

This doctrine was fully recognized by this court in the case of Dravo et al. v. Fabel et al. (132 U. S. 487), wherein Justice Harlan, in speaking for this court, says:

> "So that, when the plaintiffs used the depositions of Dippold and Fabel, taken 'as under cross-examination,' they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit."

II.

That this evidence of the statement of Martindale, was, as to appellants, mere hearsay, would seem to go without saying, were it not for the sanction of so able a court, as the Circuit Court of Appeals, which decided this case. This statement, as shown by the testimony of the receiver, was made in January, 1900—nearly a year after the action had been brought, and while the testimony was being taken in the case. It was a narration of a transaction that had taken place nearly two years before, and as such was a pure and simple narration of past events, and not a statement explanatory of and a part of a transaction in which Martindale was engaged when making it. There was not one element to bring it within the exceptions of the rule permitting hearsay testimony. If Martindale be treated as an agent of the appellants, his statement, not explaining, or forming any part of a transaction of the business of his agency, and concerning a past transaction with which his principals had no connection, could not be used to bind the principals. His statement was not concerning anything that the appellants were interested with Martindale in, but was concerning an independent transaction, with which appellants had nothing to do. It was a statement, as to what another party said two years previously. There is no rule of evidence which is known that would take it out of the category of hearsay.

The "New Orleans," 106 U. S., 13;
Winchester etc. v. Creary, 116 U. S., 161;
Marchand v. Griffon, 140 U. S., 516;
Grimes G. D. Co. v. Malcolm, 164 U. S., 483;
Greenleaf on Evidence (15th ed.) pars. 98 to 115.

Cross's statement, which formed a part of the transaction, could, of course, have been testified to (if it was ever actually made), by Martindale, as a witness, but his mere statement out of court concerning it, was utterly inadmissible.

SIXTH POINT.

The 8th, 9th 10th, 11th, 12th, 13th and 14th specifications of error should be sustained. (See assignments of error, pr. tr. pp. 214 to 217, inclusive.)

For each of the reasons already stated, these assignments of error, covering statements made by Martindale long after the commencement of this action, not under oath, or authorized by appellants, constituted hearsay testimony, and the admission of the same was clearly prejudicial error.

SEVENTH POINT.

The Circuit Court of Appeals erred in affirming the decree of the Court below giving to Morton Albaugh, as receiver of the First National Bank of Emporia, affirmative relief, by decreeing, that he, as such receiver, was entitled, upon his cross-bill, filed March 21, 1900, to the fund in controversy. (Pr. tr. p. 174.)

The [illegible] filed by Morton Albaugh on March 21, 1900, or at any other time, was an answer, thereto on pages 133 to 136 of the printed transcript. The allegations in this answer were put in issue by the stipulation of the parties appearing on page 131 of the record.

While the court, in its decree, called this answer a cross-bill, the reading of it shows that it was only intended as an answer. The last paragraph before the prayer, asks leave of the court, if it should be deemed necessary, to file a proper cross-bill. Upon this answer, the court had no right, or power, to grant affirmative relief.

Ford v. Douglas, 5 How., 143;
Railroad Co. v. Bradleys, 10 Wall., 299;
Fidelity etc. Co. v. Mobile etc. Co., 53 Fed., 852;
Wood v. Collins, 60 Fed. 142; 23 U. S. App., 224;
Hill v. Ryan Grocery Co., 78 Fed. 27, 41 U. S. App., 714;
Owens v. Heidbreder, 78 Fed. 838, 41 U. S. App., 736;
Ringo v. Woodruff, 43 Ark., 498.

While it was suggested in the argument in the court below, that the testimony of Martindale, as to the purpose for which this bill of sale of March 4th was executed was to secure $7,500.00, and that in any event the receiver would be entitled to receive that, such suggestion is not worthy of consideration, as there was no evidence that this money was obtained; and further than that, in equity a party cannot succeed upon a case proved, but not alleged, any more than upon a case alleged, but not proved.

Foster v. Goddard, 1 Black, 506;
Washington R. R. Co. v. Bradleys, 10 Wall. 299;
Grosholz v. Neuman, 21 Wall. 481.

EIGHTH POINT.

The claims of the administrator, and Martindale, were dismissed by the decree of the Circuit Court. (Pr. tr. pp. 173, 174.) Neither the administrator or Martindale appealed from such decree of dismissal, or from the judgment of the Circuit Court of Appeals, hence the right and interest of the administrator, and of Martindale,

in the fund in controversy, has long been ended, adversely to them.

Chittenden v. Brewster, 2 Wall., 191;
The Quickstep, 9 Wall., 665;
The Stephen Morgan, 94 U. S., 599;
Cherokee Nation v. Blackfeather, 155 U. S., 218;
S. P. R. R. Co. v. United States, 168 U. S., 1.

It therefore follows: That this fund belongs either to the appellants, or to the appellee.

If it should be possible, that this court should find, that neither appellants, or appellee, were entitled to this fund, then, as the administrator's right to the fund has been barred, it should be distributed *pro rata* to all the creditors, and in such case the decree of the Circuit Court should be reversed, and a distribution ordered, after paying all the expenses, including allowances for counsel.

Johnson v. Waters, 111 U. S., 640;
Adams v. Kehlor Milling Co., 38 Fed., 281;
Trustees v. Greenough, 105 U. S., 527;
Central R. R. v. Pettis, 113 U. S., 116;
Dodge v. Tulleys, 144 U. S., 451.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 159.

FOURTH NATIONAL BANK OF ST. LOUIS ET AL.,
APPELLANTS,

vs.

MORTON ALBAUGH, RECEIVER, &c., APPELLEES.

REPLY BRIEF FOR APPELLANTS.

ATTEMPTED DEPARTURE FROM ISSUES MADE BY PLEADINGS AND QUESTIONS CONSIDERED BY LOWER COURTS.

The brief for appellee closes with an attempt to shift the issues and to depart entirely from the questions involved in the lower courts by claiming a pledge of the fund in controversy by acts of Cross and Martindale independently of the March bill of sale (pages 51–55 of brief for receiver). It is clear from the record that nothing of the kind was hereto-

fore suggested. The answer of the receiver (Record, 133) specifically pleads the March bill of sale as the basis and only ground for his claim of a preference out of this property.

The decree (p. 173) follows the answer:

"That Morton Albaugh, as receiver of the First National Bank of Emporia, Kansas, upon his cross-bill filed March 21st, 1900, is entitled to the fund arising from the sale of the Sunny Slope property."

The circuit court of appeals in its opinion says:

"The trial court appears to have found in accordance with the contention of Albaugh, the receiver of the First National Bank of Emporia, that the bill of sale dated March 4, 1898, * * * was executed by C. S. Cross in favor of William Martindale * * * as trustee for said bank, to secure the payment of a very large sum of money which Cross then owed said bank. * * *

"We conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia, and that from and after the execution of that instrument all of his personal property of every kind and description, except his personal effects, insurance policies and the contents in his house in Emporia, Kansas, stood pledged for that purpose."

The matters now brought up were not taken as being in the case or entitled to any consideration as grounds for the receiver's claim of lien. The letter of August 2, 1898, written by Cross to the comptroller, as well as the talk with Jobes, made no reference to any bill of sale, and, at best, are rather shadowy things to bring up against direct and posi-

tive evidence that written bills of sale did then exist; and on no theory are such statements competent evidence to prejudice the rights of appellants which had then vested in them under the July bill of sale.

The rule is well settled that the departure from the issues made and the questions considered in the lower courts which is attempted in this case will not be permitted.

Washington R. R. Co. *vs.* Bradleys, 10 Wall., 299.

Grosholz *vs.* Neuman, 21 Wall., 481.

But even if such claim had been made originally, there is no evidence showing an intention to give a lien independently of the bills of sale.

DELIVERY OF JULY AND NOVEMBER BILLS OF SALE.

The evidence is direct and explicit that there was a delivery by Cross to Martindale of the two bills of sale under which appellants claim. The only witness who had any knowledge upon the subject was Martindale. He testified:

"Q. I will ask you whether or not you have in your possession the original of an instrument mentioned as a bill of sale in the complaint, dated July 15th, 1898?

"A. Mr. Keilogg, my attorney, has it.

"Q. Is that the paper that you now hold in your hand?

"A. Well it has every appearance of it.

"Q. Do you know the signature of C. S. Cross?

"A. Yes.

"Q. State whether or not that instrument is signed by C. S. Cross?

"A. It is.

"Q. State when that instrument first came into your possession.

"A. I am not absolutely sure what date, but my best recollection is the 15th of July.

"Q. What year?

"A. Year of 1898."

* * * * * * *

"Q. Now state the circumstances that led up to this and all of the surrounding circumstances of the giving of this bill of sale.

"A. Mr. Cross, in the suit pending in the Lyon county court, was compelled to give a bond. * * * He asked me who would go on his bond, and I said I would. He said I wish (—) would call Colonel Whitley over. I telephoned him and called him over and said Mr. Cross has to give a bond in a suit, and we want you to sign it. We both signed it then. Some time after that, I don't remember just how long, Col. Whitley came in the bank and said, 'That is a pretty large bond which (we) signed for Mr. Cross the other day; it is perfectly safe, is it?' I said, 'I think so.' Mr. Cross was away at the time. When he came home I said, 'Col. Whitley is a little bit worried about that bond;' and he said, 'I think I ought to give you and Col. Whitley a bill of sale or mortgage to protect you, and protect you for the paper you have endorsed for me.' I don't know whether it was a bill of sale or mortgage. And he wrote the bill of sale or mortgage, whatever you call it.

"Q. I will ask you what you did with it?

"A. Well, in the first place I took it over to the hotel and was going to show it to Col. Whitley, but he wasn't in at the time, and I took it to my house and it remained there until after Mr. Cross's death.

"Q. Has it been in your possession ever since he gave it to you?

"A. After Mr. Cross's death I gave it to my attorney."

* * * * * * *

"Q. Now I will ask you whether or not you have in your possession a paper, a copy of which is attached to the bill of complaint and marked 'Exhibit D,' and dated Nov. 15th, 1898?

"A. Yes, sir.

"Q. Do you hold that paper in your hand?

"A. I do.

"Q. Is that signed by C. S. Cross?

"A. Yes.

"Q. You may state the circumstances that surround the giving of that paper.

"A. Mr. Cross came to my house on that day, at the time Mr. Jobes was there, and we did not know whether the bank would be closed or not; I didn't know how much paper I was on with Mr. Cross, and I said to him, 'How much paper am I on with you?' He said, 'That of New York, St. Louis and the Kansas City notes. (That is the Harvey note, and I was also security for the Union national for $10,000.00 there.) He went right into the other room where my desk was, and he remarked, 'Can I use your desk a minute?' I said, 'Yes.' He wrote this instrument and came out and handed it to me. That is about the sum and substance of it.

"Q. Have you had that in your possession ever since?

"A. Yes."

* * * * * * *

"Q. Were you interested in these notes which you have spoken of as being secured by these instruments in any way aside from being a joint maker thereon with Mr. Cross and an endorser on them with Mr. Cross?

"A. I had no personal interest in them at all, only as an indorser" (Record, pp. 136, 137, 138).

And on cross-examination:

"Q. Mr. Martindale, at the time of giving this bill of sale on July 15th, 1898, that was taken primarily to secure you

and Col. Whitley for going upon that bond which has been introduced in evidence?

"A. Yes.

"Q. And that was the talk with reference to it?

"A. Well, he spoke about securing Col. Whitley on the bond and paper I had endorsed for him" (Record, p. 139).

* * * * * * *

"Q. Mr. Martindale, I notice this bill of sale of July 15th seems to be written on two separate pieces of paper of the same kind of ruling and texture and has been folded together many a time and has all the while been in this position. What shape was it in when you first saw it?

"A. That would be a pretty hard question for me to answer.

"Q. You notice that something has been torn off above, did you not? Could it have been written on Sherman house letter-head?

"A. I always supposed it was written on bank letter-head and the heading torn off. All I know about it is that Cross handed it to me as it is.

"Q. Would you say it was not written on letter paper of the Sherman house in Chicago?

"A. I wouldn't say what paper, but it is just as it was handed to me by Mr. Cross.

"Q. Would you say you did not receive that from the hands of Mrs. Cross, widow of C. S. Cross, after C. S. Cross's death?

"A. I would."

* * * * * *

"Q. Did it (a box with papers received from Mrs. Cross after Cross's death) include any of those bills of sale that have been delivered here?

"A. It did not" (Record, pp. 142, 143).

Against that testimony there is nothing except surmises and the unfounded and unwarranted suspicions of counsel for the receiver. Because Martindale received from the

hands of Mrs. Cross, after Cross's death, some papers, counsel charges that the July and November bills of sale were among them, and had not been previously delivered to Martindale. He picks up scraps of writing, apparently made by Cross in despondent moods, which no one knows anything about, and parades them as competent evidence. At page 20 of his brief one of these papers, dated May 12, 1898 (Record, 169), is copied at length, with the prefatory statement that it is not competent evidence, and then at pages 36 and 47 he bases upon its statements an argument for the March bill of sale. Under no circumstances are these papers, including the letter of August 2, 1898, to the comptroller, competent evidence against appellants, unless it might be that parts of the comptroller's letter would be admissible for the purpose of impeaching Martindale.

The censure of Martindale by counsel is wholly gratuitous. There is nothing to justify any imputation upon his honesty as a man or his credibility as a witness. The very letter of Cross, which the receiver makes so much of, exonerates Martindale from blame for the condition of the bank. Cross says:

"Mr. Martindale will now learn for the first time how I have carefully deceived him, principally by way of substituted papers of which he has no knowledge. * * * I know of nothing further to add except as to Mr. Martindale—this—a terrible thing for him for he has trusted me without reserve."

Though Martindale was vice-president and a director of the bank, he had nothing to do with its active management. He was not a practical banker, and trusted to Cross. He was deceived and financially ruined through the misman-

agement of the man he trusted. But, in all fairness, we submit there is nothing in this record which justifies the charge that Martindale committed willful perjury when he testified to these bills of sale. Something more is needed beyond the breath of counsel to thus tarnish the good name established by a long life of fair, honest, personal dealing with his fellowmen. Counsel also seems to forget that he relies upon the testimony of the same witness to prove delivery of the March bill of sale.

NO SUPERIOR EQUITIES IN THE RECEIVER.

It is contended that there are peculiar equities in favor of giving this fund to the Emporia bank. The depositors and other creditors of that bank have the first claim upon the bank assets, but no equitable appeal will allow them to reach out and take in the individual property of the bank officers to the prejudice of the latter's individual creditors. The Sunny Slope property did not belong to the bank. There is no more reason to make a claim to it in favor of the receiver on merely equitable grounds than there is in favor of appellants. The $60,000 of appellants' money went to Cross. What use he made of it is not shown; but it is as likely to have gone into the Sunny Slope property as was the money he used out of the bank. The equities are by no means all on one side. If equity alone is to control the disposition of this money, all creditors should share in its distribution.

CROSS COULD PREFER CREDITORS.

As between appellants and the receiver, we must look solely to the bills of sale. Except for them, this fund, as part of the individual estate of Cross, would have gone to his administrator for the benefit of all his creditors, including the parties here disputing. Consequently, before the court can divert it as a preference for any creditor, there must be competent evidence to establish such favored creditor's right.

An insolvent or failing debtor may prefer one or more of his creditors, to the exclusion of others (Randall *vs.* Shaw, 28 Kan., 419; Tootle *vs.* Coldwell, 30 Kan., 125); so that it cannot be objected by a non-favored creditor that his equities are greater than are those of the favored one.

RULE THE SAME, WHETHER MARTINDALE WAS SURETY ONLY OR A JOINT PRINCIPAL.

The authorities cited in our original brief support this proposition, and especially does the case of National Bank *vs.* Ridenour, 46 Kan., 707, where the mortgagee was, as a principal, jointly liable with the mortgagors for the debt. This being a Kansas contract, the construction and effect that would be given to it by the supreme court of that State should govern this court. The securing of payment of the creditor's claim is regarded as the primary object of the transaction.

AGREEMENT FOR DEPOSIT OF MONEY IN JOINT NAMES OF THE RECEIVER AND ADMINISTRATOR CONFERRED NO ADDITIONAL RIGHTS.

In the receiver's supplemental brief it seems to be contended that the effect of the stipulation entered into for the sale of the cattle and the holding of the proceeds was to vest them in the receiver, unless some one established a superior right. We do not so understand it. The receiver was acting in the capacity of agent or trustee for all the parties in the sale of the property and the deposit of the proceeds. It was the same as if the fund had been paid into court to abide its determination of the disputed right to it. The agreement or stipulation itself expressly forestalls any such contention.

"It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle shall be prejudiced in any manner, but that all of said rights shall attach to and be vested in the said net proceeds derived from the sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property, and the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto." * * *

It is claimed now that the receiver "needs no affirmative relief;" that all he has to do is to hold on in spite of his agreement that he can assert no right to this fund which he could not maintain as to the cattle. Such a contention fur-

nishes its own refutation, and merely demonstrates the vital importance of explicit written agreements under some circumstances.

ADMISSION OF DECLARATION OF MARTINDALE TO ALBAUGH AND LAMBERT.

We concede that if such declarations were pertinent to a proper cross-examination of Martindale they might be competent for the purpose of impeachment, and Martindale might be asked about them to refresh his memory, or, if he should be considered as the witness of the receiver as to the March bill of sale, he might be asked about the statements to show that the receiver was taken by surprise by the testimony given in court, and, according to some authorities, the previous declarations might be shown; but the purpose of such evidence and the ground on which it is admitted is to protect the party calling the witness from the effect of his testimony given in court. It is not competent as independent evidence to prove the fact about which the declarations were made.

The statements made out of court, not under the sanction of an oath, do not rise to the dignity of original evidence on the issues of the case, but are admissible merely because of the bearing they may have on the credibility of the witness. Of course, there are exceptions, as in the case of statements against interest by a party to the suit, but this is not one of them.

It must be kept in mind that these declarations testified

to by Albaugh and Lambert were solely with reference to the bill of sale under which the receiver claims.

They did not tend to put in dispute anything Martindale had testified concerning the July and November bills of sale. The receiver claims through Martindale, and sustained to him much the same relation that existed between Martindale and the appellants. By Martindale the receiver tries to explain the otherwise meaningless March bill of sale. The witness testifies about it and tells what it was given for. The testimony does not, however, support the receiver's claims. He might refuse to accept such testimony as the truth and prove the facts to be otherwise by other witnesses. But he does not do that. He shows that Martindale stated differently out of court, or was understood to state differently, and the court takes these unsworn statements as proving a fact in dispute against the sworn testimony given by the witness in court.

Suppose that on the trial Martindale, testifying as a witness called by appellants, had said that the $30,000 due the New York bank was not one of the debts intended to be secured by the July and November bills of sale, and then that bank had proposed to prove that it was included by showing that Martindale had so stated out of court at some previous time, would any court have hesitated to say that such fact could not be proven in that way? Yet that is exactly what was done in this case in behalf of the receiver respecting his bill of sale. If there is any law to sustain such a decision it has escaped our attention.

CONCLUSION.

Other questions are fully discussed in our original brief, and we will not repeat what we have there said. We emphasize our contention that there is no competent evidence to sustain a decree awarding this entire fund to the receiver by virtue of the March bill of sale.

Respectfully submitted.

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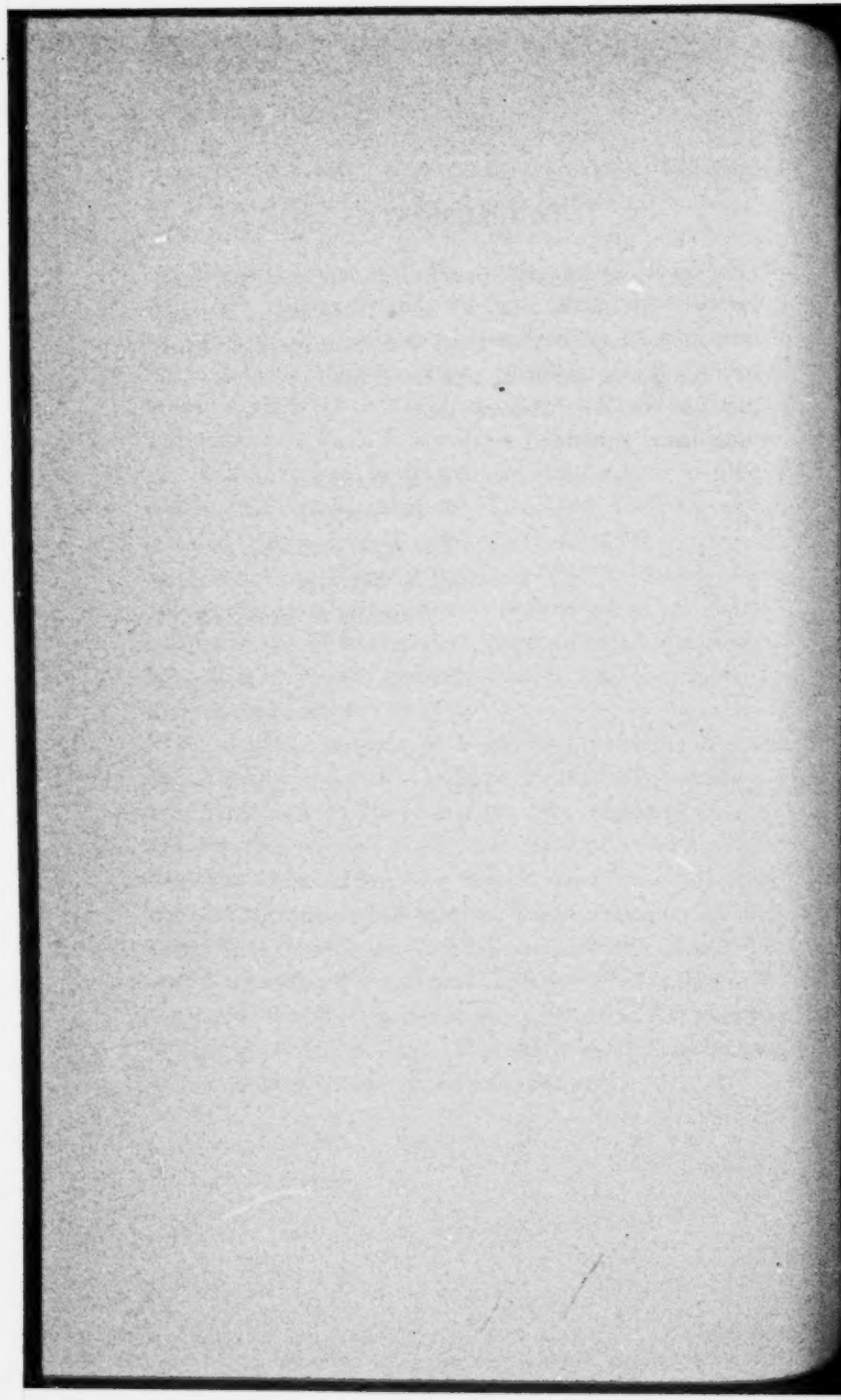

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 159.

THE FOURTH NATIONAL BANK OF ST. LOUIS, FIRST NATIONAL BANK OF NEW YORK, AND FORD HARVEY, APPELLANTS,

v.

MORTON ALBAUGH, RECEIVER OF THE FIRST NATIONAL BANK OF EMPORIA; F. C. NEWMAN, ADMINISTRATOR OF THE ESTATE OF C. S. CROSS, DECEASED, AND WILLIAM MARTINDALE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR MORTON ALBAUGH, RECEIVER OF THE FIRST NATIONAL BANK OF EMPORIA.

E. W. CUNNINGHAM,
T. F. GARNER,
FRANK HAGERMAN,
Appearances for Appellants.
MORTON ALBAUGH,
Receiver, &c.,
JOSEPH R. WEBSTER,
Appearances for Appellee.
J. JAY BUCK,
Of Counsel in Appellate Court.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9454

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STATEMENT.

The whole record is printed. The appellants' statement is so materially incomplete that it is necessary to restate the case entire.

1. November 16, 1898, the First National Bank of Emporia, Kansas, with $100,000 capital and $100,000 surplus, failed. Its president, C. S. Cross, a suicide, was insolvent, owing the bank about $300,000. Its vice-president, William Martindale, officing in its banking-room, a director and member of its discount board, was also insolvent, owing the bank $76,000 (R., 139). Cross had made three bills of sale

of all his personal property, in the nature of mortgages, to William Martindale, as trustee. The first, March 4, 1898 (R., 170), was as security to the First National Bank of Emporia. The later ones, July 15 and November 15, 1898 (R., 166 and 167), are claimed to have been made to indemnify Martindale against loss upon joint obligations of himself and Cross, upon which, as between themselves, he was surety for Cross. This action was brought by the Fourth National Bank of St. Louis, holder of two obligations of Martindale and Cross, for subrogation to Martindale's equity in the two later mortgages. The First National Bank of New York and Ford Harvey, the other appellants, by cross-bills claimed the same relief, *pro rata*, to their demands, claimed to be of like character. The effect of these claims, if upheld, would, under an "equity of subrogation," give all of Cross's property to Martindale and Cross's creditors for Martindale's protection, although he owed the bank a much larger sum, and had he as surety paid such joint debts could not be allowed to claim such protection against the bank, toward which both he and Cross had shamelessly violated and abused their trusts.

February 28, 1899, the Fourth National Bank of St. Louis, in equity, in the United States circuit court, district of Kansas, sued the appellees and the First National Bank of New York, Ford Harvey, and H. C. Whitley, as defendants. The parties, except Harvey, voluntarily appeared (R., 50). The parties for brevity are respectively styled, viz: Fourth National Bank of St. Louis, Missouri, "St. Louis bank;" First National Bank of New York, "New York bank;" First National Bank of Emporia, Kansas, "Emporia bank;" Morton Albaugh, its receiver, "receiver;" F. C. Newman, administrator of the estate of C. S. Cross, deceased, "administrator;" Ford Harvey, H. C. Whitley, and William Martindale by their surnames.

By stipulation, the mortgaged property was sold and its proceeds stand in its place. The circuit court decreed all the fund, $53,396.89, to be paid to the receiver (R., 173, 174).

The St. Louis bank, New York bank, and Harvey appealed (R., 175) to the United States circuit court of appeals, which affirmed the decree (R., 211), and further appealed to this court (R., 219, 220).

Complainants' amended bill, filed April 14, 1899 (R., 11), by consent of Martindale and the administrator, on which the trial was had, averred, in substance:

The corporate organization of the St. Louis Bank in Missouri; of the Emporia Bank of Kansas, its insolvency and appointment of its receiver; the administrator's appointment and citizenship of the administrator, Harvey, Whitley and Martindale in Kansas; that Cross was president of the Emporia bank and died owning large personal property at Sunny Slope farm near Emporia, unincumbered except as herein mentioned; on and before July 15, 1898, the St. Louis bank held and still holds unpaid two notes of $10,000 each, as between Martindale and Cross—in fact, debts of Cross, viz: *a*, by S. Nation to order of Martindale and Cross, by them endorsed and renewed in like form; *b*, by Martindale and Cross to the St. Louis bank taken up and replaced by one of C. V. Eskridge to Martindale and Cross and by them endorsed. Cross, July 18, 1898, made, executed and delivered to Martindale as trustee a chattel mortgage (Ex. C., R., 14) of said Sunny Slope property conditioned, *first*, to protect Whitley and Martindale, sureties on a certain bond; *second*, to pay Martindale any paper on which he and Cross were mutually makers or endorsers; *third*, to pay the balance to the Emporia bank for all matters he owed to it; also, November 15, 1898, a bill of sale, absolute in form (Ex. D., R., 15), but in fact a further security for said indebtedness. Cross died November 16, 1898, and Martindale at once took possession of all the mortgaged property, when the receiver seized and without right took it from him, whereupon all parties interested signed a stipulation (Ex. E., R., 15) for sale of the property, its proceeds to await adjudication of right thereto, which sale was made and the proceeds, about $55,000, are now held under said agreement (R., 13). *The St. Louis bank and all others holding paper on which Martindale and Cross are bound, which under the agreement between them should be paid by Cross are entitled to be subrogated to Martindale's rights and to be paid out of said fund,* among which are the New York

bank, Harvey and Whitley. Prayer for account of the sums due those entitled to share and for its distribution in accordance with their equities and for judgment against Martindale for $20,000 and 6% interest from December 19, 1898.

The New York bank filed answer and cross-bill April 22, 1899 (R., 17), alleging in substance that—

all averments of fact in the bill were true and its conclusions of law correct; that July 15, 1898, it held a debt of Cross of $30,000 made by Martindale and Cross, W. Martindale, C. S. Cross, due October 3, 1898, renewed by a like note due December 5, 1898, in fact the debt of Cross as between them, and intended by Cross to be secured by the mortgage and bill of sale, and *this defendant is entitled to be subrogated to the rights of said Martindale under said chattel mortgages* and to receive *pro rata* the proceeds of the mortgaged chattels. Prayer for distribution of the fund and for judgment against Martindale for $30,000 and 6% int. from Oct. 3rd, 1898.

Harvey's intervening petition, filed March 21, 1900 (R., 128), recites the bill in substance (R., 128), and, in substance, avers (R., 130):

A note made by Cross July 30, 1898, to him (Harvey) for $10,000, for six months, at 7% interest, endorsed by Martindale before delivery, in fact the debt of Cross, unpaid, admits all averments of the bill, and cross-bill of New York bank, prays account and distribution *pro rata* of the fund.

Martindale answered April 28, 1899 (R., 18), and in substance—

admits all facts set out in the bill; denies all averments of the pleadings of the administrator, receiver, and New York bank. Avers that the Union National Bank of Kansas City, Missouri, is holder of a $10,000 note of Cross, signed by him (M.) as surety, and has the same relation to the fund as the St. Louis and New York banks, and said Union bank is a necessary party. Prayer that the Union National Bank

of Kansas City, Mo., be made party and required to plead, and that judgment go against him only as surety and for proper equitable relief.

The administrator's answer (R., 16–25) claimed the fund for administration for benefit of creditors generally. After the decree of the circuit court the administrator made no further contention and did not appeal. An extended abstract of his former contention is unnecessary on this appeal.

The Receiver's answer (R., 133) admitted the corporate character of the several banks, and the receiver's appointment, and alleged that Cross died sole owner of the property, free of all liens save a bill of sale to Martindale, trustee, which in legal effect was the chattel mortgage of Cross to the Emporia bank; that just prior to March 4, 1898, Cross was compelled to have a large sum of money to avoid sacrifice of the mortgaged property, and being president of the Emporia bank appealed to Martindale, its vice-president and member of its discount board, and procured from the Emporia bank through Martindale at least $40,000 for his own private uses and as part of the same transaction executed and delivered to Martindale as trustee for the Emporia bank a bill of sale or chattel mortgage to secure the money then obtained, and other sums then due from him to the bank; that Martindale accepted the trust and never during Cross's life repudiated it. At that time Cross owed the bank much more than the value of the property, and with the $40,000 then obtained, amounting to nearly $300,000, all of which Martindale knew and therefore could not legally receive or accept for himself or for others further conveyances of said property, and the bills of sale alleged in the amended bill are void as against the receiver's claim. The Emporia bank had long been insolvent, as Martindale and Cross knew. Immediately upon Cross's death the receiver took possession of all the property in suit, and at the Emporia bank's expense cared for and sold it and deposited its proceeds to the credit of the administrator and himself under the stipulation (Exh. E, R., 15). January 2, 1900, he first learned the principal facts here pleaded regarding the March 4, 1898, bill of sale (Exh. A, R., 135–'6), which covered all of Cross's property not exempt by law, as Martindale, vice-president of

the Emporia bank, well knew, and in his giving said credit to Cross, and in the making and acceptance of the instrument, Martindale and Cross both intended it solely as a security to the Emporia bank. Prayer for dismissal of the bill and recovery of the fund to the use of his trust.

DECREES BELOW; APPEALS; ERRORS ASSIGNED.

After a hearing the circuit court made a decree (R., 173) March 22, 1900, dismissing the bill and all intervening and cross bills, except the receiver's, giving him all the fund under the March 4, 1898, bill of sale. The St. Louis and New York banks and Harvey only appealed (R., 175), assigning errors jointly and severally (R., 176 to 199). The matter was heard in the appellate court and affirmed (R., 211). The St. Louis and New York banks and Harvey jointly assigned errors (R., 212) and petitioned for allowance of appeal, gave an approved bond (R., 218, 219), and citation issued (R., 220).

The proofs consisted of (*a*) oral testimony taken before a special examiner (R., 27 to 127); (*b*) oral testimony and documentary evidence adduced before the court, transcribed by the stenographer (R., 136 to 173); (*c*) stipulations (R., 131) as to Harvey's note (R., 132); as to the Liebfried suit and bond (R., 161), and that such suit was finally dismissed and the bondsmen's liability terminated.

COMPLAINANTS' EVIDENCE.

S. NATION testified (R., 27–41) that his note to Martindale and Cross carried by the St. Louis bank represented what originally was a debt of Cross's father and was an accommodation note given at Cross's request, such as (R., 31) he had often given to Martindale & Cross, at the bank, not more than two of $10,000 each in any one day, but hundreds of thousands of dollars in the aggregate, "enough to build the Nicaragua canal."

C. V. ESKRIDGE testified (R., 41–65) that no consideration moved to Martindale for either of two $10,000 notes of Octo-

ber 24, and November 14, 1898, to Martindale and Cross endorsed "Martindale & Cross," "C. S. Cross," "W. Martindale," the first to the New York bank, the second to the St. Louis bank. He, Martindale, Severy, and Cross's father, H. C. Cross, had formed a partnership by written articles (R., 55) January 2, 1882, for publishing a newspaper (R., 54). The paper bought a lot and erected a building, in which Martindale and Cross took some interest. "I knew Martindale had an interest in the grounds and buildings." The *Emporia News* was purchased and Cross said (R., 44) that "Martindale would take an interest." He first found out Martindale was interested in the newspaper business eight or ten years ago [1889–'91]. He took up the paper assuming whatever interest any other party claimed (R., 45). These matters ran on about eighteen years, and they "never had a settlement," and he "signed any paper Cross desired signed, hardly taking any account of it." "When he wanted a note signed I signed it" (R., 48). Martindale took $5,000 of $25,000 of the newspaper corporation stock (R., 51). He had been giving these "accommodation" notes for perhaps fifteen years. When the bank failed he supposed his actual indebtedness to it was $10,000 or $15,000, or perhaps $20,000 (R., 53). Anything above that he thinks is accommodation paper (R., 52). The note (Ex. 2), held by the St. Louis bank, *may have represented a part of his legitimate debt.*

H. P. CLARK, book-keeper (R., 84), testified from the Emporia bank books that the two St. Louis bank's notes A & B of $10,000 each were renewals of two like notes, dated October 13, 1898, which took the place of one note of $10,000 and one of $6,786.45, by S. Nation, September 19, 1898, to Martindale & Cross, endorsed like those in suit, and a note of $10,000 by W. J. Ryan (R., 86), December 20, 1897, to Martindale and Cross, with like endorsements, all amounting to $26,786.45. The Nation notes had been carried by renewals from November 16, 1897, with like endorsements.

The $30,000 New York note was a renewal of a like note of May 2, 1898, discounted there to take up other indebtedness of Martindale and Cross then maturing.

WILLIAM MARTINDALE testified (R., 137) he and Cross signed the New York bank note. Cross was compelled to give a bond, and he with Col. Whitley signed it. Whitley said that "is a large bond we signed for Cross, it is safe, is it?" I told Cross that "Whitley is a little bit worried

about that bond." Cross said "I think I ought to give you and Col. Whitley a bill of sale or mortgage to protect you and protect you for the paper you have endorsed for me." He wrote the bill of sale, I took it to show Whitley, but he wasn't in, and I took it to my house, where it remained till Cross's death, when I gave it to my attorney (R., 138). The New York and St. Louis banks' notes were then outstanding. November 15, 1898, Jobes, the examiner, was there, and we did not know whether the bank would be closed. I asked Cross "How much paper am I on with you?" Cross said the New York, St. Louis, Harvey, and Union National $10,000 notes. He said, "Can I use your desk?" I said "Yes." He wrote this instrument (Ex. D; R., 15), and came out and handed it to me.

On cross-examination, under objection, he testified (R., 144): He received a bill of sale prior to that of July [1898]. Received that early in March, I would think at its date [March 4, 1898, Ex. I, R., 170]. Cross said he wanted to use $7,500 of the bank funds in the Liebfried matter, and wanted to make a mortgage or bill of sale to cover that amount (R., 147); denied telling Bank Examiner Jobes that any of the New York or St. Louis banks' debt was his own obligation (R., 139, 142). Was entirely ignorant that Cross or himself owed the bank anything, though it turned out that he owed it $76,000 and $37,000 as stockholder's liability (R., 142); does not recollect that Cross under oath told the bank examiner in his presence that the property was free and clear, and belonged to and would inure to the Emporia bank (R., 143). The night of the day Cross died Mrs. Cross gave him papers she found, being two bills of sale (Ex. D, R., 167, and Ex. E, R., 167), both dated July 14, 1898, and letters H and H 2 of July 13, and May 21, 1898 (R., 169). (R., 144:) Denied that closing the bank was talked of at Jobes's examination in May, 1898, or that an indulgence of six months was then granted (R., 146). Denied knowing that the property in suit was represented to be unincumbered in the report to the Comptroller of August 2, 1898 (Ex. J, R., 171), which he signed (R., 147), *but don't know, as he would have called attention to his incumbrance if he had known such statement was there* (R., 148); he signed (Ex. J, R., 168) that the Ryan $10,000 note in St. Louis bank was his own debt (R., 149). He and Cross were jointly interested in the Salina Gas Company, a corporation (R.,

152), which he supposed owed the bank $5,000, but did not know it owed the bank $75,000. Had a little interest with Cross at Carl Junction, Mo. (R., 150), July 13, 1898. The only bill of sale by Cross he knew of was that of March 4, 1898, given to protect the Emporia bank (R., 154). After Cross's death he told Johnson, Henning, and perhaps Plumb that he would not claim under his bill of sale; he then thought his property worth $200,000, and that he could meet all his obligations, and that if the property in suit would bring $40,000 it would save the Emporia bank, and told them he would let it go to the bank.

THOMAS EVANS (R., 66) testified:

He was superintendent of the Sunny Slope farm. The afternoon of Cross's death Martindale told him to see that everything was taken care of as usual. A few days later, at his home, Martindale said he had a bill of sale of all the stock there, and wanted Evans to take charge of it as before (R., 71). No one could have observed any change in the possession. He did not mention to the receiver that he was holding possession for Martindale or of his claiming to have a bill of sale.

STIPULATIONS.

(R., 132:) June 17, 1898, Liebfried sued Cross for accounting as partner in the Sunny Slope to cancel $20,000 of notes Liebfried had given Cross, and praying recovery of $35,000, a receiver, and an injunction. A receiver was denied, but an injunction was allowed unless Cross give bond to pay any judgment Liebfried might recover. Martindale and Whitley, as sureties, gave such bond. October 14, 1898, Cross obtained a verdict. Liebfried moved a new trial, which was denied January 2, 1899, and suit was dismissed October 30, 1899 (R., 139). The bond liability (R., 166) might have been $75,000, but has ceased (R., 132). Administrator was appointed November 26, 1898. Exh. E, at R., 15, for sale of the property, was signed November 26, 1898.

(R., 131:) For Harvey. Cross borrowed of him $10,000

and gave the note (Exh. A, R., 130) which, with interest, is unpaid. Martindale endorsed it as surety. Harvey had no knowledge of the disposition of its proceeds.

EVIDENCE FOR RECEIVER.

Martindale's cross-examination (R., 144) under objection, that:

the March 4, 1898, bill of sale (Exh. I, R., 170) he received, he thinks, at its date of Cross, who said he wanted to use $7,500 of the bank funds in the Liebfried matter and wanted to make a mortgage or bill of sale to cover that amount.

JOHN MADDEN (R., 155), one of administrator's counsel, testified:

That when they were taking testimony in the case they subpœnaed Martindale, who with his counsel asked to be excused from testifying, and made a statement of the facts about the March 4, 1898, bill of sale; said that Cross stated to him that he had borrowed from, and was largely indebted to, the bank and would have to use more money for Sunny Slope, and that he made this bill of sale and handed it to Martindale as security to the bank for those money matters. I have no recollection of any statement of $7,500 or of any other amount. [This on the St. Louis bank's motion the court excluded; R., 156.]

MORTON ALBAUGH, receiver, testified (R., 156):

Mr. Martindale stated January, 1900, that in March, 1898, Cross said he owed quite a large sum to the bank, expected to have to use more of the bank's money, and that he gave him this bill of sale for the protection and benefit of the bank.

On cross-exam.: This was since this suit was commenced. [Appellants here moved to exclude this testimony, which was overruled] (R., 157). Lambert questioned Martindale quite a little and asked the particulars about the different bills of sale. I am quite sure Martindale did not say anything with regard to any particular sum of money. No one asked him whether the March (R., 158), bill of sale was given with reference to any particular debt. Am quite

positive Martindale did not mention $7,500 or any particular amount.

Redirect: This was my first information of that [March 4, 1898] bill of sale, therefore my attention was attracted to it. On that I set up my answer claiming the property. Martindale produced it. I had not heard of it before.

J. E. LAMBERT (R., 159) was present at the interview mentioned. This was the first he had definite information of the March 4, 1898, bill of sale. Martindale then first, so far as I was informed, exhibited it. I then at once prepared the pleading for the receiver (R., 160). "He [Martindale] said Cross came into the bank, gave him a bill of sale, handed it to him, and he laid it on his desk; that it remained there until after the bank failed; that Cross said to him at the time he handed him the bill of sale 'I have used a large amount of the bank's money, I am compelled, or expecting, to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'" Martindale mentioned no amount, did not mention $7,500. I was giving intent interest and attention to what he was saying. [Here appellants moved to strike out the foregoing from "R., 160" *supra* as hearsay and an attempt to impeach their own witness, which the court overruled, and appellants excepted.]

Cross-exam.: It is not my recollection that any one in the room asked if Cross mentioned how much or what particular amount. There was no talk of that kind by any of the parties, nor about $7,500, if there had been it would have impressed my mind and I would have remembered it, for I knew Cross's debt in March of that year [1898] to the bank was much in excess of $7,500.

F. C. NEWMAN, administrator (R., 163), testified: That Cross died November 16, 1898, and his debts other than to the Emporia bank were between $80,000 and $90,000.

C. S. JOBES, bank examiner (R., 164): Early in July, 1898, he discussed with Martindale portions of Cross's indebtedness to the Emporia bank, that part arising from discrepancies in the account with the New York bank; informed Martindale of Cross's explanation as to the $35,000 discrepancy, and asked if he verified that statement, which he did. Jobes then advised him of another with the New York bank (R., 165) of about $10,000, which Martindale could not ex-

plain. He discussed with Martindale, prior to November 15, 1898, Cross's large indebtedness to the Emporia bank. In a conversation had with Martindale, Cross, and Davis (referring to memorandum), I recited the discrepancies I noticed in the accounts of the New York bank of $6,787.50. It was explained by Cross or Martindale or by both that $300 of it was the debt of Martindale and Cross, $1,487.50 that of Martindale and Cross jointly, and $5,000 that of Cross; another of $2,550.27 in the Nat'l Bk. of Commerce, Kansas City, was admitted to be the debt of Cross; in the Bank of Madison $17,000, $12,000 was said to be Cross's debt and $5,000 Martindale's; in the St. Louis bank $22,798.94, a $10,000 Ryan note, was $5,000, the debt of Cross, and $5,000 of Cross and Martindale jointly. This was the evening of November 15, 1898.

Mrs. C. S. Cross (R., 162): The evening of Cross's death, about 6 p. m., Martindale came to her room, and about the first thing he said was, "Have you any papers for me, have you found any papers for me, or is there anything for me?" She gave him some papers found in an envelope addressed to her, with a note to her, which said: "Give the enclosure to Mr. Martindale at once, there is a question of law involved." She gave Martindale the enclosure, a Sherman House, Chicago, envelope, which Martindale opened. There were papers in it that she did not see. About 10 or 11 that night she called Martindale and gave him two bills of sale, one on a letter-head, and one on a form. About July 13, 1898, Cross was away, she did not know where (R., 163). She found the papers in her tin box to which Cross had a key. She searched because Martindale was so insistent that there must be something there.

Prior to the receiver's answer, while the administrator was defending for the estate, testimony was adduced, viz:

J. M. Johnson (R., 95) [over appellants' objection]: The Monday morning after the bank closed [November 21, 1898], he went to Martindale's house, anxious to learn something from headquarters. Mr. Martindale tried to make him believe the bank would pay out dollar for dollar. I "put the question how he expected the bank would realize this money. Martindate put a good deal of stress on the Sunny Slope business and figured it up," "thought it would realize

$40,000, and then the depositors would get that and get it soon if nothing hindered the sale." Martindale "thought it would pay out more than that, probably $50,000, and said: 'So you see, John, it will pay out $90,000, or $100,000, and you will get that very soon, and with the (R., 96) good paper that I know must be good and with my property behind that, too, you will get it if I have to go without a home and wear old clothes.'" "I asked him the question, if there was any indebtedness, could possibly be any indebtedness, that would come up that would hold this money and keep it from coming into the bank." He answered, "None in the least. It is an impossibility for it to be."

He had another conversation with Martindale in Henning's office. "It was just about the same time," in April, 1899. [See R., 27 and 127]. (R., 97:) "He said he had nothing to do with it" [the Sunny Slope property]. "He did not have no cinch on the Slope business, had nothing to do with the Slope business, never did."

Cross-exam.: In neither of these conversations did Martindale say anything about having a bill of sale.

JOHN HENNING (R., 107), over appellants' objection: Martindale attended a depositors' committee meeting February 23, 1899. Martindale said their resources were two or three times their liabilities; the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unincumbered he was willing to put in, and we would get 100c. on the dollar, and then Johnson he kind of questioned that and he * * * Martindale figured out that Sunny Slope would bring $50,000 or $55,000, something like that, and that he was amply able to make the balance. He did not say anything about a bill of sale [on the Sunny Slope property]. He just talked just like this was a sure thing, this Sunny Slope money.

GEORGE PLUMB (R., 107), one of the depositors' committee, over appellants' objection: At that time he [Martindale] then speaking about the amount that would probably be paid to the depositors, said that Sunny Slope would go in and figured what that would be. * * * We talked of the amount of stuff there was there, of the value of it. He never mentioned the bill of sale.

CHARLES W. JOHNSON (R., 109), over appellants' objection: I had a talk with him [Martindale] about a week or ten days after the bank closed, a few days afterwards. I met

him near the opera-house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there, and he said the Sunny Slope money would be the bank's, and would go to the depositors.

JOHN STOTLER (R., 110), over appellants' objection: I had a conversation with him [Martindale] at the Whitley hotel, I judge about a week after the failure of the bank. Mr. Charles Johnson was with me, and he told us we need not worry about our money. * * * He spoke about the Sunny Slope business, said the proceeds of that would come right into the bank. Not to my knowledge did he say anything about having a bill of sale or any incumbrance of any kind on the personal property at Sunny Slope.

C. S. JOBES (R., 98): Examined the Emporia bank November 9th to 15th, and closed its doors November 16, 1898, remaining in charge to February 16, 1899. (Over appellants' objection, R., 99): During the November, 1898, examination, "I informed Cross and Martindale that I had discovered discrepancies * * * amounting to between $6,000 and $7,000 in the case of the New York bank and to between $20,000 and $25,000, nearly $25,000, in the case of the St. Louis bank. * * * Cross explained to me how each item occurred, stating so much was the joint liability of himself and Martindale. I had a memorandum of the discrepancies in my hand, and turned to Martindale, asking him if the amounts named by Cross as the joint liability of Martindale and Cross were correct, and whether he recognized his liability thereunder, and he answered that they were correct, and that he recognized his liability. That was a conversation with Martindale and Cross. I had other conversations * * * with Martindale separately from Cross. * * * The New York bank had advised me that the Emporia bank was indebted to them $35,000. These figures not appearing on the Emporia bank books, I asked for an explanation." (Cross explained it was not a debt of the Emporia bank, but of Martindale and Cross, and the New York bank afterward verified this, saying its former statement was a mistake.) "In the conversation with Martindale he verified that statement and said the Emporia bank was not, as he knew, indebted to the New York bank, but Martindale and Cross were indebted, as Cross had stated" (R., 101). Of the St. Louis Bank discrepancy, "Martindale stated that grew out of certain indebtedness owing by himself and Cross

and certain indebtedness of Cross personally." * * * I spent Thursday and until three p. m. Friday [November 9th and 10th] in examination of the bank before Cross returned. During that interim I had a conversation with Martindale regarding Cross's indebtedness to the bank. He advised me what Cross's resources were; what his prospects were with reference to the sale then advertised; what other property he had, and opportunities to sell it; how much money he (Martindale) believed would be realized from that sale, and the time he believed would elapse before it would be realized, *turned into the bank*, and applied to the retirement of Cross's indebtedness; then on the evening * * * immediately preceding closing the bank doors, this same matter was gone over with Martindale and Cross. Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by December 8th (R., 102), 1898, he would unquestionably have $40,000 to turn over to the bank as proceeds of his advertised sale. * * * As to the amount that would be realized from this property Cross insisted it would reach safely $90,000. I asked Martindale for his judgment with reference to the amount, and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed on the proceeds of the sale. I then put the question to them as to whether any of their creditors had liens upon this property, that would serve in any way to interfere with the money coming in promptly to the bank. Both answered there was none, and in further response to that question Cross said he could have $40,000, arising from the advertised sale, in the bank before closing hours December 7th. Martindale suggested that he better not be too positive about that, as it would be too close connections, and he better give himself a little more time. No reference was made to any bill of sale to Martindale affecting the property of Cross on Sunny Slope, during that conversation (R., 103). November 21, 1898, the receiver went to Sunny Slope farm, and informed Evans there in charge that he regarded the personal property there as property of the bank, and desired he (Evans) should manage it as theretofore, consulting with the receiver in reference to it and to dispose of stock as opportunity occurred, suggesting that it would be well not to sell property listed in the prospective sale, and agreeing to furnish necessary funds for current expenses from date of

Cross's death. He did pay such expenses. Evans informed the receiver during the week following the closing the bank of a sale of two calves agreed on some days before, for $500, asking direction if it should be closed. The receiver approved the sale, and advised caution as to getting cash at delivery. This was November 22d or 23d, 1898. A few days later Evans (R., 104) turned over the $500. November 28, 1898, the receiver went to Sunny Slope and took formal possession and held it until all the property was disposed of.

Cross-examination (R., 105): The New York bank discrepancy both Martindale and Cross explained as, approximately, $7,000 to $10,000, the individual debt of Cross, and $19,000 to $23,000, the debt of Martindale and Cross jointly, to be exact would have to refer to memoranda then made. Both assented to the correctness of the figures. The term "discrepancies" included *the differences between the amounts* claimed on the Emporia bank books to be due it from the New York and (R., 106) St. Louis banks, and the amounts admitted by those banks to be owing to the Emporia bank. * * * The proceeds of notes discounted for account of Martindale and Cross appear in the accounts of those banks as credited to the Emporia bank, at the same time sums equal, or generally larger, were debited to the Emporia bank for maturing notes of Martindale and Cross. The notes credited were of similar amount as those sued upon. In the conversations with Martindale he unqualifiedly admitted the joint liability of himself and Cross on the $30,000 New York bank note; as to the $20,000 St. Louis bank item Jobes' recollection was not clear.

H. P. Clark (R., 110): Cross was president and director of the Emporia bank from January 12, 1892; cashier from November 1, 1881, to that date. The discount board from January 12, 1897, were Wm. Martindale, H. F. Martindale his son, and C. S. Cross. The board met weekly. H. C. Cross, father of C. S. Cross, organized the bank December 12, 1871, and was its president to January 12, 1872. Wm. Martindlae was director from its organization to its close and vice-president from January 8, 1878. Cross, November 15th and 16th, 1898, owed the bank about $300,000; July 12th, 1898, about $250,000; in March, 1898, between $200,000 and $250,000; in December, 1897, about $200,000.

F. C. NEWMAN, administrator (R., 112): At his death Cross's property outside Sunny Slope did not exceed $2,500, and I know of his having no more in July, 1898, and have known him for 21 years.

W. R. SMELSER (R., 113): Managed some mining ventures, beginning in the spring of 1896, for Martindale and Cross around Galena and Cave Springs, Kansas, (R., 114), the organization of a mining corporation subscription for and issue of shares therein to Martindale and to Cross in March, 1897. (R., 117.) They expended "several thousand dollars" coming from Emporia bank. Martindale was at the workings personally "two, three or four times, perhaps a time or two more," "gave directions what to do," and once gave Smelser his check. (R., 118:) Before organization of the corporation Martindale had a ⅓ interest equal with Cross. (R., 115:) Smelser was succeeded in the management of the Galena enterprise by C. E. Fuller, in the summer of 1897.

C. E. FULLER (R., 119): Took charge of the Galena enterprises perhaps as late as June 1897. Smelser, Martindale, and Cross continued to manage the Cave Springs property. (R., 120:) Martindale, Cross and Fuller composed the Lomond Mining and Milling Company, a partnership, succeeding the Smelser corporation. They built a mill and the machinery was bought in name of Martindale and Cross. December 31, 1897, Martindale wrote Fuller a letter (copy in the record) about a contract with Cooley for erection of a mill. (R., 121:) They expended about $11,000 on the concentrating plant. (R., 124:) Fuller expended there "thirty-odd thousand dollars." (R., 122:) Fuller remained manager to about April 1, 1898. Martindale was at the properties "a great many times," "more often during construction of the mill, than Cross," and gave directions. Fuller made many of his reports by letter to Martindale, one of February 28, 1898, is at R., 122, 127. (R., 124:) Martindale gave only some small checks and once $200 cash to Fuller, and most of the expenditure was paid by the Emporia bank through drafts, one of these by Smelser November 30, 1896, for $150, is at R., 118, and one by Fuller for $500, March 5, 1898, is at R., 121.

R., 170, in the stenographer's report of testimony taken before the court, filed March 22, 1900, is the first of the bills of sale, which Martindale testifies was delivered by Cross to him "early in March, 1898," to secure the bank, and was by him first disclosed at the conference of January, 1900, and on which the receiver's answer was based, and is as follows:

Ex. "I."

R., 170: Know all men by these presents, that in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale as trustee his heirs, executors, administrators, and assigns, the following goods and chattels, viz: All of my personal property, of every kind and description and wherever located with the exception of my personal effects insurance policies and the contents of my house in Emporia, Lyon Co., Kansas. To have and to hold, all and singular the said goods and chattels, forever, and the said grantor hereby covenant with the said grantee that he (—) the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha- good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

C. S. Cross.

Executed in presence of

—— ——.

Next in time are two bills of sale, dated July 14, 1898, found by Mrs. Cross in her box on the day of Cross's death, and by her that evening given to Martindale. Nothing is claimed by any one under them, so they are not here set out.

They are found at R., 167, 168, Exhibits "D" and "E." Then follow in time those which Martindale testifies were delivered to him at their date, and on which the appellants' claims are founded, viz:

Ex. "C."

For and in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged I do hereby sell, transfer and assign unto W. Martindale as trustee all my personal property of every kind and description and whatever located, except the contents of my house where I am now living in Emporia, Lyon Co., Kansas, excepting all my policies of life insurance—this sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to 8375.00 and int., which does not include the 4500 Davis & Cross note. The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses, now located on Sunny Slope farm, Lyon Co., Kansas, together with all other personal property thereon or on farm adjacent—also all notes, stock, bonds and mortgages (excepting as before stated those securing my indebtedness to my mother Sue S. Cross). The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon Co. court, after that he is to pay himself for any paper upon which he and I are mutual makers or endorsers. The balance if any to be paid the First Nat. Bank of Emporia, Ks., for all matter I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. Cross.

Ex. "B."

Emporia, Kansas, *Nov.* 15, 1898.

For one dollar and other valuable considerations the receipt of which is hereby acknowledged, I hereby sell, transfer and assign unto W. Martindale or his assigns all my right, title and interest to the following personal property, located in Emporia twp., Lyon county, Kansas, and upon what is known as Sunny Slope farm and the leased lands

thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc., and also all other personal property located thereon whether specifically described herein or not.

Given under my hand and seal the date above written.

C. S. Cross.

Ex. "H" 2, while not competent evidence, is in the record and is here given as a declaration of Cross, casting some light on these transactions.

Ex. H 2.

I desire to state the misfortunes of myself and the bank have been caused through my faults and errors. I inherited a large debt which I endeavored to meet by going into other schemes which have all been practical failures and only got me deeper into the mire.

As to the bank matters I desire to say that I carefully laid to deceive both the board of directors, the cashier and employees. Mr. Martindale will now learn for the first time how I have carefully deceived him, principally by way of substituted paper of which he has no knowledge. The reports and letters written the comptroller have been by me misrepresented to the board, they having signed on the last page and I having sent other letters than the ones read to them, changing every one but the last sheet. I have had a hard-luck story most of my lifetime,—the only pleasant feature being that of my present wife who has been a good and true woman.

Mr. Davis, our cashier, has never made an improper entry on the books and knows nothing of this whole miserable business. Death I do not fear—it is preferable to the agony of the past year. I know of nothing further to add except as to Mr. Martindale—this—a terrible thing for him for he has trusted me without reserve. I have given him a bill of sale of all my personal property.

C. S. Cross.

Ex. J, which Cross's letter above indicates he may have substituted sheets in, appears at R., 171. The closing sen-

tence of it at least was no doubt unchanged, as a change could not be made without destroying the signatures. Martindale testifies that his signature to it is genuine. This important paper is in part as follows:

Ex. J.

Emporia, Kansas, *Aug.* 2, 1898.

Comptroller of the Currency, Washington, D. C.

Sir: In answer to your favor of the 22d ult. would say

* * * * * * *

2nd. As to direct liability of Martindale & Cross as payers, I really cannot see how Mr. Forman figured it? There was no note of Mr. Martindale in the bank for any sum great or small. There was a note of Martindale & Cross for 5,389.86 and an overdraft for the same parties of 2,885.30 which latter has since been made good. * * * Check of W. Martindale 5,000.00 on Madison was sent to that bank and by them credited to us. W. Martindale trustee for $1000.00 is secured to Mr. M. by about 15,000 worth of clear real estate. The original amount of this note was for 8,000.00. This bank is also secured by more than enough collateral notes to take up the 1,000.00 note. The Excelsior Water Mill Co. is not owned by W. Martindale, but is an incorporated company, Mr. *N.* [M.?] it is true being the largest stockholder holding 13,000 of the $25,000 stock. This company's buildings and machinery are new and modern and have cost over 35,000 within the last two years and they have on hand about $20,000 of wheat and flour.

The note of Thos. Cross endorsed by C. S. Cross is an accommodation endorsement as far as Mr. C. S. Cross is concerned, he never having enjoyed any benefit from the matter whatever. 8,500.00 of the H. C. Cross estate paper is secured by collateral and the estate is entirely and surely solvent. The note of S. K. Cross also belongs to the Cross estate and is endorsed by H. C. Cross and not by C. S. Cross. Both S. K. Cross and H. C. Cross are dead. The legal time for closing the H. C. Cross estate will be in Octo., 1898, at which time an entire closing of the matter will be had and without loss to the bank. The Lomond Co. note of 10,000 has been reduced to 5,000.00 by Mr. Cross, that being his proportion

of the paper. The other portion has been extended still holding Mr. Cross as endorser. The H. L. Liebfried note has been paid by Mr. Cross. Our present position in the matter would therefore be this—Martindale & Cross is erroneous as 26,550.72, Eureka bank 15,000.00 and cash item 5,000.00 on Madison have been paid. Cross items have been reduced 10,000. Excelsior Water Mill Co. is a corporation and the amount due from them is not properly chargeable to Mr. M. In further addition would say that Mr. Cross has been offered 40,000 for some cattle (*which are free and clear*) but upon our advice refused to sell for the figure as they are easily worth 10 or 25 M—more money and negotiations are now in course with two other parties on a 65,000 basis and we believe the cattle will be sold at that price or near it within the next 30 days if not sooner. Matter of Excelsior Co. has not really been increased, but is by reason of two examiners regarding the paper from two different standpoints as it is signed in two ways—one "Excelsior W. M. Co." the other "W. Martindale mill a/c" by making comparison with Mr. Jobes' memo. I think you will find the totals have been reduced. The H. C. Cross estate matter is in the same category—8,500.00 was signed by H. C. Cross prior to his death. The remainder is signed "C. S. Cross, ex'r of the estate of H. C. Cross, deceased." * * *

Emp. Rep. Co. owns a clear business property (3-story brick b'd'g) and it is certainly worth more than the amount named at force sale. C. V. Eskridge shows that he owns something like $35,000 in clear property. Salina Gas Co. has not been increased—perhaps Mr. Jobes did not include the 1,858.04 note in his list. * * * I am sure that Mr. Forman will agree to the Martindale & Cross paper being either erroneous in amount or a reduplication. * * * Matter of legal reserve will be attended to. * * *

As no doubt the department is aware we have been subjected to the most bitter and malignant attacks—anonymous letters to our customers, newspapers, innuendos and every means and methods of bushwackers. We know and feel that we are able to meet all attacks, but we must crave the indulgence of the department. *The large personal and real holdings of the president* and vice-president, *will be devoted towards increasing the strength of the bank.* All the personal and real property of the vice-president is free and clear in every respect; and barring two undivided interests in

R. E. *the property of the president is entirely clear*—the two interests referred to have most excellent equities and the mtgs. on same have been given for balance of purchase-money. As you will notice over 60% of the stock is held by the pres't and V. P. and they are the parties most vitally interested. As we explained previously we have been desirous of cutting down our surplus to 20,000—this was always intended to reduce our taxes (4⅛%) and while we cannot agree with the examiner as to losses, yet we have no desire to contest the question *and if the department will kindly bear with us until the regular meeting in January, 1899, we will at that time charge off $80,000.*

Resp'y, C. S. Cross, *Pres't.*

O. K.
Wm. Martindale.
R. D. Thomas.

Also two letters found in Mrs. Cross's box which Martindale admits are genuine, and his signature to the first one, "F," was proven by H. P. Clark (R., 92, 93), viz:

R., 168: Ex. "F."

Emporia, Kansas, 3, 2, '97.

C. S. Cross, Esq.:

The two notes of $10,000 each made by W. J. Ryan,—one held in St. Louis and the other by 1st Nat. Bank of Emporia, Ks., are my personal obligations and I hereby agree to protect the same.

Yours truly, W. Martindale.

Ex. "G."

Emporia, Kansas, 10, 25, 1894.

C. S. Cross, Esq.

Dear Sir: It is expressly understood that upon the note of W. J. Ryan for 10,000 dated Oct. 24th, payable at 1st nat. bank, N. Y., and by them discounted and which bears the endorsement of Martindale & Cross, W. Martindale and C. S. Cross that I, W. Martindale, am the real maker and

payer of said note; that W. J. Ryan as principal simply gave the note for my accommodation and that C. S. Cross the endorser is only an accommodation endorser for my sole use and benefit.

W. MARTINDALE.

THE ERRORS ASSIGNED (R., 212.)

The 1st and 2d assignments allege error of the court in the definition of appellants' position as suing in the right of Martindale, claiming through and by subrogation to him and entitled to only such rights as he had.

The 5th assignment alleges error in allowing too extended cross-examination of Martindale.

The 9th, 10th, 11th, 12th, 13th, and 14th assignments allege errors in permitting witnesses J. M. Johnson, Jobes, Henning, Plumb, Charles Johnson, and Stotler to testify as to statements made by Martindale before suit was brought or any claim made under the bills of sale of July 15 and November 15, 1898, that to which Jobes testifies being made by Martindale, under oath, to Jobes officially as bank examiner, in Cross's presence, the others after Cross's death.

The 6th, 7th, and 8th assignments allege error in permitting witnesses Albaugh and Lambert to testify as to admissions of Martindale made after suit was brought and pending.

The 3d and 4th assignments challenge the sufficiency of the evidence to sustain the decree.

Discussion of the errors assigned under this general arrangement and in this order better serves the purposes of logical argument than to take the assignments severally.

BRIEF AND ARGUMENT FOR THE RECEIVER.

I.

DEFINITION OF APPELLANTS' POSITION.

Appellants have no independent standing, but can claim only by subrogation to rights in Martindale and through him. There was no error in the court so holding.

This was appellants' understanding and the position assumed at the commencement of suit. The bill (R., 4) and amended bill (R., 13) of the St. Louis bank, after alleging its claim against Martindale and Cross, and that, as between them, it was Cross's debt for indemnity against which he gave Martindale the bills of sale of July 15 and November 15, states its own claim of right that—

> complainant and all other parties who hold paper upon which said Martindale and Cross are mutually bound and which under the agreement between said Cross and Martindale should be paid by said Cross *are entitled to be subrogated to the rights of said Martindale* and to have their claims paid out of said fund.

The New York bank's answer and cross-complaint (R., 19) alleges—

> this defendant *is entitled to be subrogated to the rights of said Martindale* under said chattel mortgages, and to receive of the fund the proceeds of said chattels, as set out in the complaint, its *pro rata* share thereof.

Harvey, by recitals, incorporates the allegation of the St. Louis bank of its right *to be subrogated* to Martindale's right (R., 129), and prays that the proceeds of the sale be a fund

for payment of his note, and all others who prove themselves to come "within the terms of the agreement aforesaid *between Cross and Martindale.*"

Martindale's answer (R., 18) is a confession of all the facts alleged in the bill.

Thus the pleadings and contention of these allied parties are in perfect accord. There is no suggestion of independent right arising to either of the creditors to claim under the bills of sale, but only that they be subrogated (*substituted*) to Martindale's right therein. Nor is such claim indicated by their proofs. The testimony shows no fact like *information to them* of the making of such instruments, or that either of them took the notes with knowledge thereof or relying thereon as security. They took them as ordinary commercial paper in faith of responsibility of the makers and endorsers.

The bills of sale did not run to appellants or either of them, but to Martindale. Their debts were not designated, or any particular debts. The alleged oral agreement was not with view to appellants' debts, but, it is claimed, *generally* to secure Martindale against liability upon *any* debts wherein, as between them, he was surety. Therefore no right inured to any one but Martindale, for, except to and through him, there was no contact of minds, no intent, that could create a pledge of the property to the appellants, and they could claim only, as they did through him, by subrogation or substitution to his right. The indemnity is available to the appellants not immediately in their right, but mediately by substitution to his right, and, if he cannot enforce it, the appellants cannot.

The right of subrogation is an equitable one purely and is subject to equitable principles and doctrines. Pomeroy, Eq. Jur., 2d ed., sec. 1419, *note*, says of it:

> Being a doctrine of purely equitable origin and nature its operation is always controlled by equitable principles. It is, therefore, never enforced so as to defeat or interfere with the

superior or equal equities of third persons growing out of express contract.

In Memphis and Little Rock R. R. Co. *v.* Dow (120 U. S., 287, 301), this court so defined the right, saying:

> The right of subrogation is not founded on contract. It is a creature of equity; it is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.

Subrogation cannot be allowed when the party under whom it is claimed could not himself assert the right. *It is a derived right existing only when the right exists in him under whom it is claimed.* The claimant stands in the shoes of him he seeks to represent, and beyond that no equity exists.

In Cunningham *v.* Macon and Brunswick R. R. Co. (156 U. S., 400, 419), this court held:

> The creditors' right of subrogation depends on the existence *in the surety* of the rights to which subrogation is sought.

Phenix Insurance Co. *v.* Erie Transportation Co. (117 U. S., 312, 321); St. Louis, Iron Mountain and Southern R'y Co. *v.* Commercial Union Ins. Co. (139 U. S., 223, 235); Wyckoff *v.* Noyes (36 N. J. Eq., 227, 230–'1); Knapp *v.* Sturgis (36 Vt., 727, 729); Franklin Sav. Bk. *v.* Taylor (131 Ill., 376, 385); Walsh *v.* McBride (72 Md., 45, 55); Garrish *v.* Bragg (55 Vt., 329, 337); Eaton *v.* Hasty (6 Neb., 419, 425, 27 Am. Dec., 365).

In the latter case the court held (6 Neb., 425) that:

> Subrogation will not be allowed if it would do substantial wrong, nor when the surety who has paid is indebted to the principal in more than the amount of the debt.

It follows that if Martindale could not equitably hold the property against the claim of the bank or of its receiver,

being indebted to the bank in a greater sum—$76,000 of debt existing when Cross's bills of sale were made and $37,000 upon stockholders' liability—or if he is barred by estoppel or otherwise to hold as against the bank, then appellants, who stand in his shoes and claim only by substitution, are equally barred. That Martindale cannot so claim will be shown in our final point.

Without analyzing severally the cases cited by appellants to support their claim to the benefits of the bills of sale alleged to have been given by Cross to Martindale as indemnity against paper signed by Martindale as surety for Cross, it suffices here to say that on examination none of them will be found in conflict with the principle here contended for. In a proper case—that is to say, where a principal has given a surety the means or securities with which "to pay" the debt—the law no doubt is that a trust is thereby created for him "who is to be the ultimate receiver of the money." That was the case in Russell *v.* Clark's Ex'r, 7 Cr., 69. But in that case the court would not proceed to a decree for want of necessary parties—the assignors—who might have equities to assert. The trust is not absolute, but may be defeated by countervailing equities. Nor can prior and independent rights be affected by such an instrument. It is not claimed that Cross gave these bills of sale to Martindale to enable him "to pay" these debts, but "to pay himself," which is to indemnify himself. As he owed the bank a larger amount, he had no equity against the bank and none can be claimed under him.

II.

There was no error in permitting cross-examination of Martindale as to the making, delivery, and purpose of the bill of sale of March 4, 1898.

The 5th assignment (R., 212, 213) alleges error that when Martindale was produced as a witness to prove the execution, delivery, and purpose of the bills of sale of July 15 and November 15, 1898 (Exhs. B and C, R., 166–'7, and R., 136–'7 and '8), counsel was allowed by the court to interrogate him (R., 144) as to the previous bill of sale of March 4, 1898 (Ex. I, R., 170), under which the receiver claimed and recovered.

The position of the parties was that appellants were seeking to charge the joint debt of Martindale and Cross primarily upon Cross's property and divert it from appropriation to payment of Cross's debt to the bank. Martindale was the principal party adverse to the receiver, the adverse parties, appellants, claiming in his right. A recovery by them would relieve him to that extent of liability upon the joint debt. The nature of the controversy was in chancery and not at law before a jury. Both of these facts bear upon the alleged error. The first, in cases either at law or in chancery, much relaxes the rules of cross-examination. The second so far vests a discretion in the chancellor that error cannot be predicated upon his exercise of it.

It is the settled rule of this court that the limit of cross-examination is largely, if not wholly, in the discretion of the trial judge. The only cases cited by appellants from this court are those wherein the trial court ruled against the party attempting to cross-examine beyond the scope of the examination-in-chief. The decisions go no further than to hold that the discretion of the trial court was not abused, and no error was committed *in refusing* such cross-examina-

tion. No case is cited wherein the judgment was reversed for error in permitting cross-examination into matters not embraced in the examination-in-chief; so the citations made are negative authorities merely.

In Philadelphia and Trenton R. R. Co. *v.* Stimpson (14 Pet., 448, 463, p. 463) it was held:

> The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the circuit court, with which this court ought not to interfere. * * * All courts ought to be, as, indeed, they generally are, invested with a large discretion on this subject. * * * We think that the circuit courts possess this discretion in as ample a manner as other tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion. * * * It is sufficient for us, however, that it was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the circuit court.

In Johnston *v.* Jones, 1 Black, 210, precisely similar, the court, referring to the foregoing decision, held (p. 447):

> A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the case. *The exercise of this discretion by the circuit court cannot be made the subject of review by this court.* We have looked through the long and searching cross-examination to which this witness was subjected. *There would have been no error if the objection had been overruled.* There was none in sustaining it.

A similar case was Hickory *v.* United States, 151 U. S., 303, 309, where a reversal was sought because the rule was not relaxed. It was held no error.

Wills *v.* Russell (100 U. S., 621) was a case like that at bar. It was assigned for error that a trial court permitted too great latitude of cross-examination. The plaintiff in error cited Philadelphia and Trenton R. R. Co. *v.* Stimpson,

supra, and Houghton *v.* Jones, 1 Wall., 702, 706. The court (p. 626) held:

Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross-examination to the matters opened by the examination-in-chief was applied and enforced; *but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross-examination to other matters pertinent to the issue.*

This should be conclusive in the present case. No prejudice was worked to appellants, who had opportunity for re-examination and for rebuttal. It was wholly within the discretion of the trial court and not subject here to review

III.

Nor was it error to permit proof of Martindale's statements, inconsistent with the present claim, made before appellants' suit was instituted.

By assignments 9 to 14, inclusive (R., 214, 217), appellants allege error in permitting proof by six several witnesses of statements made by Martindale before appellants brought suit or asserted claim under the bills of sale of July 15 and November 15, 1898, inconsistent with his claim that they were a security to him for appellants' debts. The statements were made when he alone could have been claiming under these instruments. This evidence was not offered for Martindale's impeachment, as it was taken before the examiner and is in his report of testimony (R., 27 to 127) which closed February 3, 1900 (R., 127), and Martindale did not testify until March 22, 1900, orally before the court, his testimony being in the stenographers' transcript of evidence taken at the trial (R., 136 to 173, incl.).

The first of these statements was under circumstances that require separate consideration.

1. November 9 to 15, 1898, the bank examiner, Jobes, had discovered discrepancies between the accounts of the Emporia bank and those of its correspondents and large indebtedness of Cross to the bank. Cross had made an explanation. Jobes testifies:

(R., 101:) During that time [November 9 and 10] I had a conversation with Mr. Martindale with reference to Cross's indebtedness to the bank. Then he advised me what Cross's resources were; what his prospects were with reference to the sale that was then advertised; what other property he had; what opportunities he had to sell it; how much money he (Martindale) believed could be realized from that sale and the length of time he believed would elapse before the same could be realized, turned into the bank and applied to retirement of Cross's indebtedness, then, the evening before closing the bank [November 15, 1898], this matter was gone over with Mr. Martindale and Cross. Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by the 8th day of December (R., 102), 1898, he would unquestionably have $40,000 to turn over to the bank, as the result of the proceeds of his advertised sale and * * * insisted within a given length of time that that money would be in hand and would be applied in that way. As to the amount that would be realized from this property, Mr. Cross insisted it would reach safely $90,000. I asked Mr. Martindale for his judgment with reference to the amount and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed on the proceeds of the sale of the property. *I then put the question to them as to whether any of their creditors had liens upon this property, that would serve in any way to interfere with that money coming in promptly to the bank. They both answered that there was none.* * * * There was no reference made to a bill of sale affecting the property of Mr. Cross on Sunny Slope during the conversation. * * * It was between 5 and 11 o'clock p. m., November 15, 1898, * * * probably after supper, for the reason that *I was examining the officers of the bank under oath* at that time and the oath was not administered, as I now recall it, until after supper.

This was a statement that the Sunny Slope property in question was unincumbered, made by Martindale under oath as officer of the bank to the examiner in the course of an official examination. It was on the evening of the day when one of the bills of sale purports to have been made and four months after date of the other. Martindale testified (R., 137) that he kept the July 15, 1898, bill of sale till Cross's death, and then gave it to his attorney, and that the November 15 bill of sale he has always kept in his possession, so that when the foregoing statement was made he had, as he claims, both instruments and no one else knew of them. Certainly no one had trusted to them. It was the statement of the sole interested party made under oath administered by authority of law in a proceeding which made it a perjury if untrue.

When Martindale was afterwards on the witness stand he does not materially dispute Jobes's testimony. He admits the examination of Cross and himself under oath by Jobes, November 15, 1898 (R., 141), and (R., 142) says, "*I do not recollect* any such conversation." He could not recollect in what shape he received the bill of sale of July 15, 1898, written on a sheet of paper from which a letter-head had been torn, suspected by examining counsel to have been a Sherman House, Chicago, letter-head, and, as Cross was there after July 15th, suspected to have been of later date. All he said is, "That would be a hard question for me to answer." He "don't recollect" the conversation between Jobes, Cross, and himself about irregularities discovered by Jobes in May (R., 144), but admits Jobes talked with him about it. When pressed with questions about the January conference and his disclosure there of the March 4, 1898, bill of sale (R., 144, 145), he answers, "I don't think I did," "I think so," "I don't believe Mr. Cross ever told me that," "I don't believe I did," "If I did not my attention was not called to it," etc. These are not denials, but evasions. Courts are too familiar with this form of evasion to credit such testimony in the interest of such a witness.

2. The other statements were of different character, but admissible. November 21, 1898, at his house, to J. M. Johnson (R., 95); November 23, 1898, at Whitley's hotel, to Stotler and Charles Johnson (R., 109, 110), and February 23, 1899, at Henning's office, to Henning, Plumb, and J. M. Johnson, acting as a depositors' committee (R., 96, 107, 108), in conversations relating to the property in question as an asset for payment of depositors of the Emporia bank, Martindale made no claim to a lien on the property under these bills of sale or otherwise. The sale was then advertised, and he said, in substance, that the proceeds would all go into the bank and be speedily distributed to the depositors. These parties were seeking from him, as senior and principal surviving officer of the bank, information as to the prospect of its liquidation. His statements to them were irreconcilable with a claim by, under, or in right of, himself upon the Sunny Slope property or its proceeds. Martindale admits the statement of February 23, 1899, to Henning, Johnson, and Plumb (R., 154); he will not deny that of November 21, 1898, to J. M. Johnson (R., 154), and nowhere denies that of November 23, 1898, at Whitley's hotel, to Charles Johnson and Stotler. All these statements stand as proven and expressly or tacitly admitted.

As above shown, Martindale was not only a party, but was the real party primarily interested. Whatever interest the appellants could assert depended "on the existence *in the surety* of the right to which subrogation is sought." The assertion of right to subrogation placed appellants in privity with Martindale, under whom they claimed, and rendered his admissions competent evidence against them.

Bouvier, Law Dictionary, l. v., defines a "privy" as "one who is a partaker, or has any part or interest, in any action, matter or thing," and "privity" as "the mutual or successive relationship to the same rights of property."

Greenleaf, Evidence, 16 ed., vol. 1, sec. 189, says:

The admissions of one person are also evidence against another, in respect of privity between them. The term "privity" denotes mutual or successive relationship to the same rights of property. * * * The ground upon which admissions bind those in privity with the party making them is that they are identified in interest. * * * Where the party by his admissions has qualified his own right, and another claims to succeed him as heir, executor, *or the like*, he succeeds only to the right, as thus qualified, at the time when his title [or as here their claim] commenced; and the admissions are receivable in evidence against the representative in the same manner as they would have been against the party represented.

These admissions of Martindale were therefore competent evidence against the appellants.

These admissions were also competent on another ground. The March 4, 1898, bill of sale was in its terms a trust of all Cross's personal property not therein excepted. The trust was well declared, but the *cestui que trust* was not therein disclosed. The admissions of the trustee were competent, to show to whose benefit the trust was created, and that the Emporia bank was the beneficiary.

IV.

There was no error in allowing Albaugh and Lambert to testify to Martindale's statements, made after suit was commenced, as to the purposes of the bill of sale of March 4, 1898, although such testimony contradicted and incidentally discredited him.

The 6th, 7th, and 8th assignments (R., 213, 214) allege error in admitting the testimony of Albaugh and Lambert of Martindale's statement pending suit as to the making, delivery, and purpose of the bill of sale of March 4, 1898.

The circumstances under which that statement was made were that during the taking of testimony (R., 155) in January, 1900 (R., 27, 127, 157), the defense subpœnaed Martindale to testify (R., 155, 159). There were rumors of prior bills of sale (R., 159) which had color, as Cross's statement of May 12, 1898 (R., 169, Exh. H 2), stated: "I have given him [Martindale] a bill of sale of all my personal property." This had been given publicity, and rumors were afloat that Martindale had a bill of sale of the Sunny Slope property, although the fact of his own bills of sale had been confided only to his attorney (R., 137), and the existence of that of March 4, 1898, had been suppressed until the January interview (R., 159). He disclaimed any lien on the property to J. M. Johnson (R., 97). At the January interview his attorney requested that he should be excused from testifying, as criminal proceedings were pending against him (R., 159), and offered to disclose all he knew about bills of sale (R., 155, 158). There were present the receiver, Albaugh, Lambert, his counsel; Graves and Kellogg, counsel for Martindale; Madden and Spencer, counsel for the administrator, and Huggins (R., 155 to 159). Martindale then disclosed and produced the bill of sale of March 4, 1898, and stated (R., 160, 155, 156) that:

> Cross came into the bank and gave him a bill of sale, handed it to him and he laid it on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale "I have used a large amount of the bank's money, I am compelled, or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.

This cleared the mystery of Cross's statement of May 12, 1898, *supra*, this being the only bill of sale existing at that time (R., 150) and being without question the one referred to by Cross in that statement. Upon this disclosure the receiver (R., 159) prepared and filed his answer.

It is argued by appellants with much insistence that Martindale was made the receiver's own witness by the question (R., 144) as to the execution, delivery, and purpose of the March 4, 1898, bill of sale, and that having made him his own witness the receiver could not impeach or contradict him. In this contention counsel err.

That bill of sale was a transaction between Cross and Martindale *alone;* the purpose was not therein declared; Cross was dead and Martindale was the sole witness by whom the fact could be proved. He was therefore *a compulsory witness.* Of impeachment of a party's compulsory witness, Greenleaf, 16th ed., vol. 1, sec. 443, says:

Where the witness is not one of the party's own selection but is one whom the law obliges him to call, such as the subscribing witness to a deed, or a will, *or the like;* here he can hardly be considered as the witness of the party calling him, and, therefore, it seems, his character for truth may be generally impeached.

Sec. 444. Whether it be competent for the party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand, it is urged that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. On the other, it is said that to admit such proof would enable the party to get the naked declarations of a witness *before a jury*, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or that the witness has recently been brought under the influence of the other party, and has deceived the party calling him.

All the circumstances mentioned by the writer, as reasons for these exceptions to the general rule, existed here. Martindale was a compulsory wittness; was the real party in interest; had recently stated differently on a promise to make full disclosure; had recently fallen under the influence of the other party; there was no jury to be confused, and the court would give only proper weight to it.

The following authorities fully sustain the doctrine laid down by Greenleaf, above quoted: Cowden *v.* Reynolds, 12 S. & R., Pa., 281, 283; Stockton *v.* Demuth, 7 Watts, Pa., 39, 41; Brown *v.* Bellows, 4 Pick., Mass., 179, 194; Williams *v.* Walker, 2 Rich. Eq., S. Car., 291, 293; Whittaker *v.* Salisbury, 15 Pick., Mass., 534, 544; People *v.* Case, 105 Mich., 92, 96; Whitman *v.* Morey, 63 N. H., 448, 456; Shorey *v.* Hussey, 32 Me., 579, 581; Thornton *v.* Thornton, 39 Vt., 122, 155.

Under section 443, Greenleaf's Evidence, *supra*, in a note the author refers to Dravo *v.* Fabel, 132 U. S., 487, 490, an authority cited by appellants in support of their contentions, with the remark: "*Contra*, quite unsound." This criticism of the learned author will by reference to the case be found hardly just to the court, as the question argued and considered was, whether a State statute for taking the testimony of a party by his adversary "as upon cross-examination" was obligatory in Federal courts in chancery proceedings. The court decided that the State statute did not apply in such cases. That decision is no doubt sound in principle. The reasoning of the court is conclusive. The attention of the court was not directed to the principle here presented, and the decision did not speak upon it.

This testimony was also admissible, for the reason and upon the ground discussed in the final paragraph of the last preceding point of argument, to define the trust and to indicate the Emporia bank as the beneficiary.

V.

The evidence was not only sufficient to sustain a decree for the receiver, but was so conclusive that no other decree could stand upon the facts disclosed by the record.

The bill of sale upon which the decree is based was first in time, upon an adequate, valuable, and sufficient consideration; was prior in equity; was such as was Cross's duty to give and Martindale's to exact, and is first in right.

His bills of sale of July 15 and November 15, 1898, were taken under such circumstances that he could not assert them against that of March 4, 1898, whether innocently taken or not. He was a director and vice-president of the bank, charged with attention to its affairs, with duty to protect it from defalcations, and could not take security on Cross's property to the exclusion of the bank.

(R., 145:) He is asked:

"At the time you received the July bill of sale and at the time you received the November bill of sale you knew of Mr. Cross's indebtedness to the bank? Answer. I did not."

Although he does not deny Jobes's testimony of the conference of November 15th, admits he was then sworn, and that Jobes talked with him in May about Cross's indebtedness, and further on that Bank Examiner Foreman had an examination in July, and says that he signed a paper written by Cross to the comptroller about the condition of the bank, supposing it was the usual report of the bank, such as he had been signing for twenty years. The paper is in the record (Ex. "J," R., 171, 173). It is not in form and does not purport to be a bank statement. It is a remarkable

paper, and conclusively charges Martindale, his signature being admitted by him, with notice August 2, 1898, of the desperate condition of the bank's affairs. The paper contains the statement:

In further addition would say that Mr. Cross has been offered $40,000 for some cattle (*which are free and clear*), but upon our advice refused to sell for the figure, as they are easily worth 10 to 25 M more money, and negotiations are now in course with two other parties on a 65,000 basis, and we believe the cattle will be sold at that price or near it within the next 30 days, if not sooner.

He says of this (R., 147): "I think some sheets have been substituted, some things in there I never heard of." But when probed with the question—

"Then if the item had been in there that it was free from incumbrance, you would have called attention to the fact that you had a bill of sale? Answer. *I don't know whether I would.*"

He would let the false statement go over his signature to deceive the comptroller!

The most remarkable part of this paper of August 2, 1898, to the comptroller in explanation of matters discovered and reported by Examiner Foreman in July are the closing sentences. They immediately precede Mr. Martindale's admitted signature, and so cannot be interpolated matter inserted upon a substituted sheet. It reads:

We know and feel that we are able to meet all attacks, but we must crave the indulgence of the department. The large personal and real holdings of the president and vice-president [Martindale] will be devoted towards increasing the strength of the bank. All the personal and real property of the vice-president is free and clear in every respect; *and barring two undivided interests in R. E. the property of the president is entirely clear.* The two interests referred to have most excellent equities, and the mtgs. on same have been given for balance of purchase-money. As you will notice

over 60 % of the stock is held by the pres't and V. P., and they are the parties most vitally interested. As we explained previously *we have been desirous of cutting down our surplus to 20,000. This was always intended to reduce our taxes* (4½ %), *and while we cannot agree with the examiner as to losses, yet we have no desire to contest the question, and if the department will kindly bear with us until the regular meeting in January, 1899, we will at that time charge off $80,000.*

Resp'y, C. S. Cross, *Pres'd't.*

O. K.
WM. MARTINDALE.
R. D. THOMAS.

The paper closed with the startling proposition to charge off $80,000, which was 40 per cent. of capital and surplus, reducing the nominal or book value of the stockholders' shares to 60 per cent. of its book value. This could not have been a substituted sheet, for it is the *final sentence immediately preceding Martindale's signature, but he supposed it was just an usual report such as he had been frequently signing for twenty years*! The question should have occurred to him how long the capital and surplus, $200,000, could last at the rate of charging off at a stroke $80,000 as losses, and it was notice that serious losses had occurred, and common prudence would prompt to an investigation. The facts were that he owed the bank $76,000, besides his stockholders' liability (R., 139), and Cross owed it $250,000, which before November increased to $300,000, yet Martindale did not know of it (R., 145), although Jobes and he had talked about Cross's indebtedness in May (R., 144), and Foreman had reported to the comptroller in such terms that this startling proposition of August 2d was sent to try and tide over, and Jobes had sworn and examined him November 15, 1898.

It simply comes to this: Under such admitted facts no amount of sworn asseverations can prove his innocence or lack of knowledge. The law will not permit one charged with a duty, to assert ignorance in the face of such facts

Knowledge is conclusively imputed whether he had it or not. He cannot take a security for his own protection from one from whom it is his duty to exact a security for the protection of the trust with which he is charged.

An analysis of the evidence and undisputed facts leaves little doubt of the intention of both Cross and Martindale respecting the bill of sale of March 4, 1898. Cross was then indebted to the bank more than its whole capital and surplus. Martindale, a director and vice-president, held 37 per cent. of the stock. He and Cross had been interested in various losing enterprises which absorbed money of the bank, among which was the Smelser zinc ventures, "several thousand dollars" (R., 117), and the Fuller (Lomond) mining schemes, absorbing "thirty-odd thousand dollars" in 1897 (R., 124); the newspaper and Salina gas and cattle-feeding losses inherited from his father, amounting, respectively, to not less than $20,000 (R., 53), $75,000 (R., 149), and $20,000 (R., 28), in all of which, except the cattle-feeding venture ("S. Nation account"), the testimony shows that Martindale was interested with Cross. Money had to be raised to carry these losses, and the bank, to cover up these misappropriations of its funds, was continually carrying fictitious and "accommodation" paper made payable to "Martindale and Cross," endorsed by them personally, individually, and separately. Martindale helped by his own signature, sometimes alone, as in the case of the two W. J. Ryan $10,000 notes, as shown by his letter of February 3, 1897 (R., 168), one of which notes entered into the St. Louis bank's "discrepancy" (R., 85, 86, 93, 99, 165). This money, squandered in new unfortunate ventures, and also misappropriated to cover for honor "inherited" misappropriations, all came from the bank, and was carried by fictitious paper in its assets. It was Cross's duty to restore it and to secure it until he could make restitution. It was Martindale's interest to get it restored and secured, as he was interested to 37 per cent. of the bank's stock and supposed surplus (or $74,000).

It was his duty as a director and vice-president to look after the bank's interest—to secure it if he could. Under these circumstances the bill of sale of March 4, 1898, was made to Martindale as "trustee" (R., 170) of "all my personal property wherever located, with the exception," &c.

Given, on the one hand, an obligation to make restitution, and, on the other hand, both an interest and a duty to secure it, the presumption becomes strong that an act between two persons so circumstanced was for the purpose in which the obligation, the interest, and the duty all concurred, for "*equity presumes an intent to fulfill an obligation.*"

The testimony of Martindale's representations to Jobes, examiner, early in July, 1898 (R., 164); his written representations to the Comptroller of the Currency August 2, 1898 (R., 171–173), his representations to Jobes, examiner, November 9 and 10, 1898 (R., 98), and under oath November 15, 1898 (R., 102, 165); that the Sunny Slope property was unincumbered, and in November was about to be converted into money and applied to liquidation of Cross's debt to the bank; then the representations to the depositors of November 21, to J. M. Johnson, to Charles Johnson and Stotler, November 23 (R., 109, 110), and to Henning, Plumb, and J. M. Johnson, February 23, 1899 (R., 107, 108, 96), in all of which he disclaimed adverse interest and assured the depositors that the proceeds of the Sunny Slope property would go to the bank for their payment, coupled with his official and fiduciary relation, makes the presumption violent that whatever interest he had was in trust to the bank.

Yet there was no distinct declaration of a trust in him for the bank. There were only Cross's statement of May 12, 1892 (R., 169, 170), that "I have given him a bill of sale of all my property;" the obligation of Cross to secure the bank; the interest and the duty of Martindale to obtain a security; his very many statements that the Sunny Slope property was unincumbered, and that its proceeds would all go into the bank for payment of depositors, and that he had

no "cinch" on it. But the March 4, 1898, bill of sale was withheld and suppressed.

At last subpœnaed to testify, he produces and surrenders it, thus disclosing his trust, and declares what it was (R., 155, 156, 60), viz., that it was given him by Cross to secure the bank the debt which Cross owed and that which he expected further to owe. Here was a valuable and moral consideration on part of the grantor, a duty and interest to obtain it on part of the trustee, an equity, and right on part of the defrauded bank, the beneficiary.

Had Martindale refused to accept the trust, equity would not allow it to fail when finally well declared and founded on both valuable and moral obligation. Assuming that all ne bills of sale were delivered, what was the effect of the first in time? If title in equity passed by the first, none passed by the second or any later one except subject to the first. Hill on Trusts, 60; Perry on Trusts, sec. 77, and Lewin on Trusts, sec. 54, all sustain this doctrine.

Martindale could afterward take no valid bill of sale, pledge, or mortgage of that property already so pledged, except subject to the interest of the bank. He was a director. This court held, in Koehler *v.* Black River Falls Iron Co., 2 Black, 713, that directors (p. 720)—

> hold a place of trust and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the stockholders [and creditors] of the corporation.

In Drury *v.* Cross, 7 Wall., 299, the duty of directors is defined by the court to be (p. 302)—

> to administer the important duties committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust.

The bill of sale Martindale took March 4, 1898, vested in him the title to, or lien upon, Cross's Sunny Slope property

for security of Cross's debt to the bank. His duty was to convert it and turn the proceeds into the bank for the common benefit of all its creditors. He could not transfer or assign it even to pay valid debts of the bank, for that would amount to a preference of such debts inhibited by section 5242 of the Revised Statutes. The only power he had was to turn it over to the bank to collect. He could not dispose of, assign, or waive such security (Hoyt *v.* Thompson, 5 N. Y., 320, 334; Gibson *v.* Goldthwait, 7 Ala., 281, 292–'3, 42 Am. Dec., 592; Hallowell Bank *v.* Hamlin, 14 Mass., 178, 180; Walworth County Bank *v.* Farmers' Loan and Trust Co., 14 Wis., 325, 329; Luse *v.* Isthmus Transit Co., 6 Ore., 125, 131, 25 Am. R., 506; McKeag *v.* Collins, 87 Mo., 164, 169; Asher *v.* Sutton, 31 Kan., 286, 289).

Trusts in personal property may be established by parol evidence (Allen *v.* Withrow, 110 U. S., 119, 28–'9). The bill of sale of March 4, 1898, while on its face declared to be *in trust*, to Martindale as "trustee," declared neither its purpose nor object. The proof of those elements of the trust was by parol. The conveyance was in the nature of a mortgage and intended to operate as such, and its purpose, even if it conveyed land, may be proved by parol (Villa *v.* Rodriguez, 12 Wall., 323; Flagg *v.* Walker, 113 U. S., 659).

It being valid as such, the beneficial interest vested in the Emporia bank upon its delivery to Martindale. Perry on Trusts, 2d ed., sec. 77, says: "If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it." In Hunnewell *v.* Lane, 11 Met., Mass., 163, 167, it was held:

> It was not in the power of the trustee to divest or defeat the trust without the consent of the *cestui que trust.*, except by a sale of the trust property to a *bona fide* purchaser, for a valuable consideration, and without notice of the trust.

Hill on Trusts, p. 60, and Lewin on Trusts, sec. 54, are to the same effect. A trust once impressed upon property will

follow it into whomsoever's hands it comes other than a purchaser for value without notice of the trust. As the later instruments were to Martindale, the trustee and holder of the first bill of sale or mortgage, he could not innocently or without notice take another conveyance of or charge upon the same property. If, therefore, the bill of sale of March 4, 1898, was good in form and description to create a lien upon the property, it is a first lien upon the fund arising from it, even if the later instruments of July 15 and November 15 are themselves valid as second and third liens.

It is contended by appellants that the description in the bill of sale was too indefinite to convey title or to create a lien. The descriptive words were (R., 170):

> All of my personal property, of every kind and description, wherever located, with the exception of my personal effects, insurance policies, and the contents of my house in Emporia, Lyon county, Kansas.

This description was sufficient to convey any chattel property Cross owned, not excluded by the terms of the exceptions. It was entirely capable of being made definite by proof of what property Cross owned and could convey. Such proof would render the identification complete of what property was intended. The property in question was practically all that Cross had, as his entire estate not exempt by law, exclusive of the Sunny Slope property, did not exceed $2,500 in value (R., 112). The description in general terms was sufficient under the law and judicial decisions in Kansas. In Interstate Galloway Cattle Co. *v.* J. K. McLain, 42 Kan., 680, 686, the court held that—

> *All the steers* which Martin had purchased, or which he owned, having been mortgaged, there could be no difficulty in identifying the property covered by the mortgages. We may look beyond the description in the instruments for purposes of identification.

In Crisfield *v.* Neal, 36 Kansas, 278, 281, a chattel mortgage was held good of property described as "one hundred and eighty head of Cotswold and Merino sheep," which were until default to remain in the mortgagor's possession unless he should attempt to remove them from Marion county. The court held that these facts were sufficient to permit identification by proofs of the sheep intended. So in Shaffer *v.* Pickerel, 22 Kan., 619, a mortgage of "250 head of stock hogs," and in Corbin *v.* Kincaid, 33 Kan., 649, "600 head of sheep and their increase for 1882, in the mortgagor's possession in Linn county, Kansas," were held sufficient descriptions as between the parties and those having notice, to create a lien upon the property intended to be charged. The description being sufficient to create a lien, and that being first in time for security of a debt justly due the bank, the receiver's claim upon the fund is first in time and first in right, even if the later bills of sale were valid to create from their dates second and third liens thereon.

There is much reason to doubt whether the bills of sale of July 15 and November 15, 1898, were ever in fact delivered by Cross. The finding of the court was general "that the receiver is entitled to the fund" (R., 173), without specially finding that the later bills of sale were not delivered. The evidence would sustain a finding that they were not, and a further finding that appellants' claims were the debts of both Martindale and Cross as principals.

Some of the undisputed facts are inexplicable, if the bills of sale of July 15 and November 15, 1898, were in fact delivered. Cross evidently regarded the March 4, 1898, bill of sale as potential, and as doing all it was in his power to perform, when, May 12, 1898, meditating suicide, in mitigation of his faults, he says: "I have given him a bill of sale of all my personal property," for then no other of the five bills of sale existed. The November 15 bill of sale could hardly have been delivered that day, as Martindale claims, for the examiner (R., 101) had them with him at the bank, making

explanations and being examined under oath up to eleven o'clock p. m., so they could not have been at Martindale's house. That the July bill of sale was not delivered is the only state of facts compatible with truth in Martindale and Cross's written statements to the comptroller of August 2, 1898 (R., 171, 173), wherein Cross's property, except "two undivided interests in R. E.," is twice stated to be "free and clear" and "entirely clear," or with the truth of Martindale's statements to Jobes of November 9 and 10 (R., 101), and November 15, 1898, under oath (R., 102), that Cross's property was clear of any lien that would prevent its proceeds going to the bank for discharge of Cross's indebtedness.

Another fact tending to the same conclusion is Martindale's anxiety to get papers on the evening of Cross's death, driving him to intrude on Mrs. Cross at such time, not for condolence, but (R., 162) to obtain papers.

"Almost the first thing he said to me was, 'Have you any papers for me, have you found any papers, or is there any papers for me?' He was so insistent that there must be something that I looked through the papers."

She gave him a sealed package, marked "important to Martindale" and "involving a point of law." The package was in a Sherman House envelope (R., 162). One bill of sale she gave him was on letter-head paper. The July 15, 1898, bill of sale is on paper from which the letter-head has been torn and for which he cannot account (R., 143). The entire conduct and all the acts and words of both Martindale and Cross are consistent with this view, or state of fact, and reconcilable with none other.

The cumulative proof becomes conclusive that Martindale received these papers after Cross's death. And it was some time after that that he nerved himself to claim under them for an application of the Sunny Slope property to protect himself. He hesitated and debated whether to do so or not. He held back and suppressed the March 4, 1898, bill of sale.

But, on the other hand, November 21, 1898, he did not assert to J. M. Johnson (R., 96); nor November 23 to Charles Johnson or Stotler (R., 109, 110); nor February 23, 1899, to Henning, Johnson, and Plumb (R., 96, 97, 107, 108) that he had such bills of sale or claims. He never openly so asserted until the filing of his answer (R., 18) April 22, 1899.

Nor is the proof at all satisfactory that any part of these claims was an indebtedness of Cross alone, except the Nation $10,000 note (R., 28). The rest of the claims trace back to indebtedness arising from losing enterprises in which both Martindale and Cross were jointly interested, except the Ryan note, which (R., 85) entered into the claim of the St. Louis bank and was wholly Martindale's debt (R., 168). The farthest back that the claim of the New York bank is traced is to a $30,000 note of March 2, 1897 (R., 89). This was after Martindale and Cross jointly took their plunge into zinc mining adventures (R., 113, 114), when they sunk "several thousand dollars" (R., 117), and "thirty odd thousand dollars" more (R., 124), so that this is, with reasonable certainty, "*certain to a common intent*," shown to have been in fact as in form the joint debt of Martindale and Cross, a part of their losses in zinc.

The evidence, therefore, decidedly preponderates against appellants' claims on both propositions necessary to give them any semblance of claim, viz: (1) that the July 15 and November 15 bills of sale were never delivered in Cross's lifetime, and (2) that Martindale was not merely a surety for Cro[illegible]

While it is true that the circuit court did not specially find upon these facts, still, if such findings be necessarily implied by the general finding, they are abundantly supported by the evidence.

But independently of any such ground, and granting for

purposes of argument all that appellants contend as to Martindale's relation as surety only for debts of Cross, and that Cross, in July and November, made and delivered the two bills of sale for Martindale's indemnity, yet they could not in equity prevail against the higher and prior equity of the Emporia bank under the bill of sale of March 4, 1898.

Martindale was merely a co-conspirator with Cross in looting the Emporia bank. He may not have known the extent of Cross's misappropriations, but he knew of some of them and was guilty himself to $76,000 of debt (R., 139). Cross had been guilty for at least seventeen years, since he succeeded his father to the bank's presidency, and inherited, and for honor struggled long to conceal and to recoup, the then existing misappropriations. Martindale was interested with the senior Cross in two of the original sources of these losses, viz., the Salina gas (R., 148–'9) and the newspaper (R., 44, 54, 55), which account never was settled (R., 45). Both had, at least from Cross's succession to president of the bank, seventeen years, been giving their names as endorsers to fictitious or accommodation paper as a show of assets to cover up these losses.

Cross struggled desperately to keep up appearances and by some fortunate stroke to get means to restore these losses. He was not insensible to his obligations or to the shame of exposure, and deliberately resolved, if exposure came, to choose death rather than to face dishonor. Martindale was of coarser fiber. When exposure came he plotted to rob the dead of the merit of his attempted restoration, and by suppression of the bill of sale of March 4, 1898, and use of those of later date to filch from the depositors all that had not been dissipated of their funds misappropriated by himself and Cross and to divert it for his own relief. He wrongs both the living and the dead. Of these two guilty officers, one glancing over the sad recital cannot but feel less respect for the moral sentiment of the living Martindale than for that of the dead Cross. Had Martindale and Cross both

planned to this end, it is too shockingly iniquitous to be permitted in a court of equity. The Sunny Slope property in equity belonged to the bank. It was all that remained tangible of $300,000 of its misappropriated funds.

Second. Independently of the March 4, 1898, bill of sale, by the joint written pledge of Martindale and Cross, August 2, 1898, to the comptroller (R., 171, 173), and by the joint oral pledge of both, November 15, 1898, to Jobes, the examiner (R., 101, 102), the proceeds of the Sunny Slope property were appropriated and pledged to pay Cross's debts to the Emporia bank. Such pledges amounted to a valid equitable assignment or mortgage of the property to the bank.

By the letter of August 2, 1898 (R., 171, 173), Martindale and Cross stated to the comptroller that—

> Mr. Cross has been offered 40,000 for some cattle *which are free and clear*, but upon our advice refused to sell for the figure as they are easily worth 10 to 25 M more money and negotiations are now in course with two other parties on a 65,000 basis, and we believe the cattle will be sold at that price or near it within the next 30 days, if not sooner. * * * *The large personal* and real *holdings of the president* and vice-president *will be devoted toward increasing the strength of the bank.* * * * Barring two undivided interests in R. E. *the property of the president is entirely clear.*

Mr. Jobes, examiner, testifies (R., 101, 102):

> I particularly call to mind a conversation had with Mr. Cross and Mr. Martindale during the evening preceding the closing of the bank, when they were going over with me the prospects and the assets from which Cross expected to realize a large sum of money, *which money would come into the bank immediately and be applied to the retirement of Cross's indebtedness to the bank.* * * * I spent the day, Thursday, and

until about three o'clock Friday afternoon in examination of the bank before Cross returned. During that interim, I had a conversation with Mr. Martindale with reference to Cross's indebtedness to the bank. Then he advised me what Cross's resources were; what his prospects were with reference to the sale that was then advertised; what other property he had; what opportunities he had to sell it; how much money he (Martindale) believed would be realized from that sale, and the length of time he believed would elapse before the same *would be realized and turned into the bank and applied to the retirement of Cross's indebtedness.* Then on the evening to which I have referred, namely, just immediately preceding the closing of the doors of the bank, this same matter was gone over with Mr. Martindale and Cross. *Cross insisted that from the proceeds of the sale of the Sunny Slope cattle, and by the 8th day of December, 1898, he would unquestionably have $40,000 to turn over to the bank, as the results of the proceeds of his advertised sale,* and show [ed] me telegrams and correspondence from prospective buyers for the residue of the cattle and for Sunny Slope farm, *and insisted within a given length of time,* that *that money would be in hand and would be applied in the same way.* As to the amount that would be realized from this property, Cross insisted it would reach safely $90,000. I asked Mr. Martindale for his judgment with reference to the amount and he stated that his best judgment was there would be no disappointment as to the estimate Cross had placed upon the proceeds of the sale of the property. I then put the question to them as to whether any of their creditors had liens upon this property that would serve in any way to interfere with the money coming in promptly to the bank. *They both answered that there was none* and in further response to that question Cross said he thought he could have $40,000, the money realized from the advertised sale, in the bank, before closing hours, on December 7th. Mr. Martindale suggested that he had better not be too positive about that as it would be too close connections, and he had better give himself a little more time.

Were there no March 4, 1898, bill of sale, or had it been suppressed by Martindale, there was still a sufficient appropriation of the Sunny Slope property in question to payment of Cross's debts to the Emporia bank. A parol mort-

gage, or appropriation of chattel property, is valid at law or in equity. Here was both a written and an oral appropriation of it by both Martindale and Cross, the sole parties interested, even admitting the delivery of the July 15 and November 15 bills of sale. Neither of them, or yet any one save a *bona fide* purchaser for value, without notice, could be heard to claim the property against the bank.

On this subject of equitable mortgages, Pomeroy, Equity Jurisprudence, 2d ed., sec. 1235, says:

> Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforcible against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees *and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property.*

Story's Equity, sec. 1231, on the same subject says:

> There is generally no difficulty in equity in establishing a lien not only on real estate, but on personal property or on money in the hands of a third person, whenever that is a matter of agreement, at least *against the party himself, and third persons who are volunteers or have notice.* For it is a general thing in equity that, as against the party himself, and any one claiming under him voluntarily, or with notice, *such an agreement raises a trust.*

In Blackburn *v.* Tweedie, 60 Mo., 505, 507, the court held that:

> An imperfect attempt to create a mortgage *or to appropriate specific property to the discharge of a particular debt will create a mortgage in equity, or a specific lien on the property.*

In Daggett *v.* Rankin, 31 Cal., 321, 326, the doctrine is thus admirably stated:

The doctrine seems to be well established that an agreement in writing to * * * appropriate specific property to the discharge of a particular debt, will create a mortgage in equity or a specific lien on the property intended to be mortgaged. The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts, contemplated by the parties, had been executed exactly as they ought to have been.

This doctrine is well established, and is supported by a great array of authority, among which are the following decisions: Hanselt *v.* Harrison, 105 U. S., 401, 405; Skiddy *v.* Atlantic, &c., R. R., 3 Hugh's C. C., 320, 355–'7; Morrow *v.* Turney's Adm'r, 35 Ala., 131, 138; Kirksey *v.* Means, 42 Ala., 426, 430; Jackson *v.* Rutherford, 73 Ala., 155, 156; Bell *v.* Pelt, 51 Ark., 433, 14 Am. St. R., 57; Jackson *v.* Carswell, 34 Ga., 279, 280; Peckham *v.* Haddock, 36 Ill., 38, 45; Monticello Hydraulic Co. *v.* Loughry, 72 Ind., 562, 566; Pinch *v.* Anthony, 8 Allen, Mass., 536, 539; Petrie *v.* Wright, 6 S. & M., Miss., 647; Husted *v.* Ingraham, 75 N. Y., 251, 257; Hale *v.* Omaha Ntl. Bank, 49 N. Y., 626, 633; Hovey *v.* Elliott, 118 N. Y., 124, 132; Smith *v.* Smith, 125 N. Y., 224; Bank of Muskingum *v.* Johnson, 47 O. St., 306, 313; De Laire *v.* Kenan, 3 Desaus, S. Car., Eq., 74. 4 Am. Dec., 604; Parks *v.* O'Connor, 70 Tex., 377, 385.

Martindale cannot claim the property "for his indemnity" after having joined thus with Cross in pledging its proceeds to the Emporia bank, nor can the appellants, his creditors, who "can assert only such rights as the surety has." They simply bought notes in faith of the solvency and responsibility of the makers without knowledge of, or

credit given to, this alleged indemnity. They have all they bought or gave credit to.

That one fiduciary of the bank, its vice-president and director and member of its discount board, could take all the property of another of its fiduciaries, its director and president, all his property three times pledged by the president and twice pledged by the vice-president in writing to the comptroller and on oath to the examiner, leaving the bank and its depositors remediless against their flagrant abuses of their trust, so violates every principle of equity as to excite surprise at its audacity and to merit judicial rebuke rather than a grave judicial decision and analysis of the morals and validity of the claim.

Upon the record made no other decree than that rendered by the circuit court could stand and the decree should be affirmed with costs.

Respectfully submitted.

JOSEPH R. WEBSTER,
Attorney for the Receiver.

J. JAY BUCK,
Of Counsel in Circuit Court of Appeals.

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FOURTH NATIONAL BANK OF ST. LOUIS ET AL.

v.

ALBAUGH, RECEIVER, &c.

SUPPLEMENT TO RECEIVER'S BRIEF.

Review of Appellants' Brief.

Appellee's brief, going to press before appellants' was filed, discussed the record in the logical order of the contentions therein disclosed as they appeared to appellee's counsel and without numeral references to pages of appellants' brief or correction of inaccuracies of statement. This supplement is therefore prepared.

Appellants, page 4, state the liability of Cross's sureties on the Liebfried bond at $7,500. It might have been $75,000 (R., 166; Receiver's Brief, 9), but had ceased before the trial.

Page 11 appellants set out an inaccurate copy of the March 4 bill of sale, one of the foundations of the receiver's claim, taken from the record (135, 136), where a mistake seems to have occurred in the transcript. The original instrument, as the record of evidence taken at the trial shows (R., 170), reads "wherever" (not *whatever*) "located" (Receiver's Brief, 18). The inaccuracy seems to be intended to be corrected at appellants' brief (44), where the descriptive clause is repeated as it appears in the instrument.

FIRST POINT.

Appellants' first point, pages 23 to 27, claims that Martindale was not contradicted, and that it was practically an admitted fact that the July and November bills of sale were delivered in Cross's lifetime, and that Martindale was merely surety for Cross upon appellants' debts. The receiver's counsel do not so understand the record. The administrator's answer expressly raised an issue upon the question of delivery of the bills of sale (R., 9, 21, 24, 26). The receiver's answer averred the March 4 bill of sale as enuring to his benefit. A large amount of evidence, termed "immaterial" by appellants, was directed to these questions. Some of the facts tending strongly to show that these bills of sale were never delivered in Cross's lifetime are discussed (pages 47–40, Receiver's Brief). It is further to be noticed that Martindale on the evening after Cross's death told Evans he had "a bill of sale" (R., 67). He mentioned only *one*, and admits he then had the March 4 bill of sale. He wanted Evans to take charge of the property. This was consistent with his then acting under the March 4 bill of sale in interest of the bank, and, as shown in former brief, *supra*, his whole course of conduct was inconsistent with intent to assert rights under the later bills of sale.

The proof is almost conclusive that he got all four of the later bills of sale from Mrs. Cross after Cross's death. She gave him a Sherman House sealed envelope, the contents of which she did not see (R., 162), and later two bills of sale, which she saw. If the two in suit were in the sealed envelope, then all his statements and admissions that he had no interest were true, and the claim now asserted was an afterthought, based upon the possession of the posthumous delivered bills of sale as color for the claim. Cross had business experience and knew the necessity for delivery of papers. The fact that he endorsed the sealed envelope

"Give the enclosed to Mr. Martindale at once, there is a question of law involved," shows there was something there that he did not intend Martindale should have the power to use until after his death, but was willing he should then profit from if he could.

So, too, the fact of his relation to appellants' debts being merely that of surety was a contested issue. It was shown that Martindale had been participant with the senior Cross in the losing ventures of Salina gas and the newspaper, out of which the junior Cross's entanglements arose. Receiver's Brief, 49, 50, Eskridge testified (R., 52) that the St. Louis bank note may have represented part of the legitimate newspaper debt. In the year the New York bank and St. Louis bank debts arose Cross and Martindale incurred "several thousand dollars" over "thirty odd thousand dollars" of losses in their zinc mining ventures (R., 117, 124). The Ryan note (R., 168, 85, 86, 93, 99, 165), certainly entered into the St. Louis bank's "discrepancy" or debt (Receiver's Brief, 42; R., 85, 86, 93, 99, 165). So it is not an admitted fact that Martindale was merely surety for these debts, and it was a fact, as the appellate court observed, that not merely Cross but Martindale also to at least $76,000 had taken and used or through misappropriation and co-operation in making fictitious paper had "*borrowed*" (?) large sums amounting to about $376,000, nearly twice its capital and surplus, between $50,000 and $100,000 of which was incurred after March 4, 1898 (R., 110).

SECOND POINT.

Appellants by their second point (Brief, 28–43) seek to shift their ground and extricate themselves from the position they originally assumed of claiming *in the right* of Martindale, and in which thus far the courts have left them. The Receiver's Brief, page 25, has endeavored correctly to define that position, and, it is believed, has done so.

The July and November bills of sale were not given, as their face shows, for indemnity against particular or certain liabilities or as security for the payment of such. The general rule, no doubt, is, as stated in Brandt on Suretyship, 2d ed., sec. 324, that if a security is given to a surety "for the payment of a debt" and "to discharge such indebtedness" or a mortgage "conditioned that the principal will pay the note," a trust is created charged upon the property for the payment of that specific debt; but such trust may be defeated by countervailing equities between the parties. For such reason, though all the facts existed to create such a trust, this court would not enforce it in Russell *v.* Clarke, 7 Cr., 69, until the parties who might have such equities were brought in.

But here no facts sufficient to create such a trust appear to have existed.

THIRD, FOURTH, AND FIFTH POINTS.

Appellants' third point, Brief, 44–57; fourth, 58–60, and fifth, 61–64, argue that there is not sufficient competent evidence to support the decree. The course of reasoning supporting this proposition is scarcely worthy of a jurist. The facts are not challenged, but the complaint is of the manner in which they were adduced. Because they are claimed to have been irregularly adduced it is claimed that the court should ignore them. This would be strange doctrine in equity, even if the premise were true. But it is not well founded.

Martindale's cross-examination (Receiver's Brief, 29–31) was, as to its scope, within the discretion of the trial court, as defined by this court in Wills *v.* Russell, 100 U. S., 261, 262. No decision is cited wherein the decree of a chancellor is reversed for that reason alone.

Treating Martindale as in every sense the receiver's witness, he was a compulsory one, interested adversely, and was,

as a compulsory witness, subject to impeachment even by the party adducing him (Receiver's Brief, 35–38).

Appellants' third point is fully and more particularly answered (Receiver's Brief, 39–54).

Under their third point, page 53, appellants contend that—

> While we may concede that the equities in favor of appellants, * * * are each controlled, and limited by the extent of the right of Martindale at *that* time * * * to have the property applied for his own protection, yet it must be held, that the right of Martindale, which in anywise limits, or controls such equities in favor of appellants, attached to the property, and not the right as it may have existed at some subsequent period of time after such equities had attached.

This is stated as a premise from which to insist that *afterward* Martindale could make no admission or commit any act which would free the property from its trust obligation for his protection as surety upon the debt. But *eo converso*, page 57, arguing against the March 4 bill of sale, counsel say:

> No claim of any kind was made under this until long after this suit was commenced, and neither Cross nor Martindale regarded it as in force when the later bills of sale were given. Even if delivered in March, 1898, for all that is claimed for it, *the parties to it could displace it with another instrument*, (prior to its being accepted and acted upon by the bank), as they clearly did by the bill of sale of July 15th, which expressly provided that such claims as appellants should be first paid * * * "the balance, if any, to be paid to the First National Bank of Emporia, Kansas, for all matters I owe them."

The casuistry in these two paragraphs is as subtile and refined as that of the lawyer in the fable who was able to draw a distinction between the case of his ox being gored by the farmer's bull, or of the farmer's ox being gored by the lawyer's bull. The precedent has never been deemed

so good as to admit of universal application. It is not applicable here for the following sufficient reason:

Martindale was, next to Cross, the bank's chief executive officer. It was his interest and duty to accept such security. Its delivery to him was a delivery to the bank, and it became assets of the bank, and he had no power to release it (Receiver's Brief, 43, 48). Admitting the execution, delivery, and purpose of the March 4 bill of sale, no adverse interest could arise by or through Martindale or any one knowing of it till Cross's debts to the bank were paid. The making, delivery, and purpose of that bill of sale is a question of fact, found favorably to the receiver's contention; and being abundantly supported by evidence in the record, the judgment will not be reversed.

But independently of the March 4 bill of sale the receiver's claim to the fund might safely be rested on the repeated pledges of the property by both Cross and Martindale to Jobes and to the comptroller, discussed at Receiver's Brief, 51–54. It cannot be tolerated that these three creditors, standing in Martindale's shoes, can assert a superior equity in the property for the protection of Martindale as Cross's surety when Martindale is himself indebted to the bank $113,000, and after both he and Cross, August 2, 1898, in writing to the comptroller solemnly pledged the proceeds of the identical property as free and clear and to payment of Cross's debt to the bank, and were thereby enabled to hold the bank in their control another period during which they or Cross misappropriated another $50,000 (R., 110).

As Martindale was the bank's chief officer next to Cross, in receiving Cross's security for the bank he became trustee to the bank. He could not displace that to his own advantage, gain, or profit, nor could he authorize his creditors to do so for him. The supreme court of Minnesota only recognize a long-established rule when they say, in Gilbert *v.* Hewetson, 79 Minn., 326, that—

A receiver or other trustee of an express trust cannot permit or authorize his agent to do with the trust estate what he is not permitted to do himself. He cannot speculate with the trust property to his own advantage and benefit, nor can he authorize or ratify such acts on the part of his agent.

On a parity of reasoning he cannot authorize his creditor to do so to his relief. A trustee cannot become interested personally, directly or indirectly, in the trust property or adverse to the trust (Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill., 320; Galbraith *v.* Tracey, 153 Pl., 54; Petrie *v.* Badenoch, 105 Mich., 45). The case of Drury *v.* Cross, 7 Wall., 299, and other citations therewith (Receiver's Brief, 44, 45), are conclusive upon this question. Martindale could not, then, in July, 1898, take for himself or his creditors another instrument to "displace" or "supersede" the prior one of March 4. As stated in Meeker *v.* Larson (Nebr.), 90 N. W., 958:

While subrogation is not founded on contract and is a creation of equity, existing solely for accomplishing the ends of substantial justice, there must in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence as recognized by courts of equity.

In the present case such established principles would, on the contrary, be violated. The bank could not itself have pledged this bill of sale from its assets, to the wrong of its own creditors, for the security of the debts of its defaulting officers, Cross and Martindale. No more could they between themselves waive the bank's security or pledge the assets for such purpose.

SIXTH POINT.

Appellants' sixth point is almost wholly an error of fact upon the face of the record. Only the subject-matter of the 8th assignment related to admissions by Martindale made after suit was brought, and belongs properly with appellants' fourth point, and is discussed at Receiver's Brief, 35–38.

The remainder of appellants' sixth point is an error of fact. Suit was begun February 28, 1899 (R., 50). The several admissions of Martindale, proof of which is complained of, were made November 15, and earlier, 1898, to Jobes (R., 101); J. M. Johnson, November 21, 1898 (R., 95); to Stottler and Charles Johnson, November 23, 1898 (R., 109, 110); and February 23, 1899, to Henning, Plumb, and J. M. Johnson (R., 96, 107, 108).

Aside from correction of this error of fact of counsel the matter is discussed (Receiver's Brief, 31–35).

SEVENTH AND EIGHTH POINTS.

These points are but conclusions from the foregoing contentions, except in one particular. It is claimed that "the court had no right or power to grant affirmative relief" upon a mere answer, "not framed technically as a cross-bill."

Counsel must have overlooked the condition of the record. Appellants' Brief, page 3, shows that this is a suit—

over the right to a fund of $53,396.89, on deposit in the Emporia National Bank, of Emporia, Kansas, *to the credit of the receiver, to abide* the final determination of this case.

The record, pages 83, 84, shows that by stipulation of the parties the property was to be sold by the receiver, and—

that he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia national bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator, said net proceeds to be treated by all persons interested the same as though the cattle and other personal property were the subject-matter of litigation. Said funds to remain in said bank until a final decision is reached in the courts as to who the said funds belong to.

The matter is controlled by the stipulation which rendered a cross-bill unnecessary, if otherwise it had been necessary

(Heath *v.* Erie R'y Co., 9 Blatchf., 316, 319). Foster's Federal Practice, 3d ed., sec. 171, says:

> When the right claimed by a defendant consists simply in excluding the plaintiff from the right asserted by the latter, of course there is no occasion for a cross-bill. * * *

The funds are in the receiver's name, possession, and control in a designated depository. He needs no affirmative relief. The mere determination that appellants have no right to it leaves the fund with him unembarrassed by any claim.

But were it otherwise, the fund is by the parties submitted to the court to be administered and to be awarded to such of the parties as shall be found its owner. No affirmative relief to recover it from the possession of any one is necessary. The parties stipulate to abide the final award. Such award could be made upon an answer, though process to enforce such award were denied until the active process of the court should be invoked by a supplemental bill.

Furthermore, where an answer in the nature of a cross-bill has been treated as such by the court and the parties and to be sufficient, no objection being taken to it, that effect will be given to it in an appellate court (Kelsey *v.* Hobby, 16 Pet., 269, 278).

The decree should therefore be affirmed.

Respectfully submitted.

JOSEPH R. WEBSTER,
Solicitor for Receiver.

J. JAY BUCK,
Of Counsel.

Supreme Court of the United States.

No. 159.—October Term, 1902.

The Fourth National Bank of St. Louis, First National Bank of New York and Ford Harvey, Appellants,
vs.
Morton Albaugh, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, deceased, and William Martindale.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 23, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought to require the defendant Albaugh to apply a certain fund to payment of debts due to the Fourth National Bank of St. Louis from one Cross, of whose estate the defendant Newman is administrator, and from the defendant Martindale. By cross bill and intervening petitions the other appellants set up similar claims. The fund is the proceeds of property of Cross sold by agreement. The appellants claim under an alleged assignment of the property by Cross to Martindale as trustee, dated July 15, 1898, and another assignment to Martindale dated November 15, 1898. The former instrument contains the provision "the said Martindale . . . is to pay himself for any paper upon which he and I are mutually makers or indorsers." The debts due to the appellants were on paper of this description, and they claim the benefit of the security on this ground. The later assignment was given to Martindale, according to his testimony, also as security for similar liabilities. It needs no special mention.

The defendant Albaugh, as receiver of the First National Bank of Emporia, claims the fund under an earlier assignment to Martindale as trustee, dated March 4, 1898. Cross was president of this bank and had been misusing its funds. Albaugh contends that this assignment was made for the purpose of securing the bank, and if that fact is established there will be nothing left for the appellants, assuming that otherwise they make out their case. Only Cross and Martindale were present when the assignment was delivered, and as Cross killed himself on November 16, 1888, Martindale alone could testify as to the delivery and purposes of the instrument. He was put on as a witness for the plaintiff, and on cross-examination testified to the delivery of the paper and by implication to

the trust being in favor of the bank, but he limited it to a sum of $7,500, which amount he testified that Cross said he wanted to use in a particular manner. Exceptions were taken to the allowing the cross-examination to be extended to these facts. Subsequently other witnesses were allowed to testify, subject to exceptions, that at different times out of court Martindale had stated that the assignment of March 4 was made to secure the Emporia bank generally for Cross' liability to it. There was a decree for the defendant Albaugh in the Circuit Court, which was affirmed on appeal by the Circuit Court of Appeals. 107 Fed. Rep. 819. An appeal then was allowed to this court.

The only error alleged which it is necessary to consider is the admission of the above evidence. Indeed, that is the only ground on which the appeal can be based. If that evidence was competent and Martindale's declarations were believed, the receiver's case was proved. If it should have been excluded, the decree would be hard to support either on the other evidence to the same point or on the suggestion that the appellants had not proved what the burden lay on them to prove.

So far as the cross-examination of Martindale goes, we see no occasion for revising the discretion of the court. *Wills* v. *Russell*, 100 U. S. 621, 626. Nor do we think the suggestion material that the defendant thereby made Martindale his own witness. The evidence of Martindale's declarations was put in not merely to contradict what he said on the stand, but as evidence largely relied on to prove the facts which he declared.

It is said that as soon as the appellants' interest under the later assignment had vested Martindale could do nothing to destroy it; that he could not release it, and that therefore he could not end it obliquely by a declaration. The conclusion does not follow from the premises, granting those premises for the purpose of argument, although they presuppose the rights of the appellants under the later instruments to be established. To destroy by release is one thing, to destroy in the sense of disproving or qualifying by proof is another. The latter is free to any one who knows the facts. There is no doubt, of course, that Martindale had a right to testify to what he was shown to have declared, however bad it might be for the appellants. Therefore the only question is whether his declaration was some evidence as against them of facts which certainly might have been established by his oath.

If ever a declaration not made under oath is to be admitted against any other than the person making it, it should be admitted in this case. The declaration was obviously against interest. It was the only evidence in the nature of things that could be had, when Martindale haltingly denied the fact upon the stand. If we were to take it very nicely, it simply did away with a qualification engrafted by Martindale upon his testimony that the instrument was security for the bank, and made it easier to ac-

cept the principal fact without the qualification. The appellants say that they have a standing under the instrument independent of Martindale. So no doubt they have for some purposes, if we follow the somewhat sweeping and undiscriminating notion of equity embodied in many decisions to be found. Nevertheless, they claim in Martindale's right as against the estate of Cross or any prior assignee. The fact that equity gives them a right to have the security applied does not enlarge or change the character of the security, and that was, as we have quoted, to enable Martindale "to pay himself for any paper" on which he was liable with Cross. The appellants get their rights from and through Martindale. Their right is only to have Martindale's right enforced as it was on July 15 or November 15. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 156 U. S. 400, 419. It even was argued on this ground that it appeared from other evidence that Martindale had no equity as against the Emporia bank, and that therefore the decree could be upheld. But, as we have said, the evidence objected to was too important not to have had an influence on the decision, and therefore we confine ourselves to the consideration of that.

It may be urged that, even if the appellants get their rights by subrogation, (and it is to be noticed that the only claim made in their pleadings is to be subrogated to the rights of Martindale,) still their rights are independent when the subrogation is complete. In reply we fall back upon the distinction between admissions and an attempt to release the rights. The distinction was recognized in England in the case of a suit by a naked trustee. If he undertook fraudulently to release the cause of action and his release was pleaded, the plea would be ordered off the files. *Innell* v. *Newman*, 4 B. & Ald. 419. See *Payne* v. *Rogers*, 1 Dougl. 407; *Anon.*, 1 Selk. 260; *Troeder* v. *Hyams*, 153 Mass. 536, 538. But his admissions were evidence for the defendant. *Bauerman* v. *Radenius*, 7 Term Rep. 663; *Craib* v. *d'Aeth*, 7 Term Rep. 666n. (*b*). The analogy by no means is perfect, but it is sufficient. In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines. The interest of Martindale continued, the appellants claim through it, and we are of opinion that, under the circumstances, admissions by Martindale contrary to that interest properly were let in. Cases of admissions by a trustee having no interest in the suit may stand on different ground.

The decree is objected to as granting affirmative relief to Albaugh against his defendant Newman. As the appellants are dismissed out of court, the error, if it was one, does not concern them.

Decree affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.